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ABSTRACT

This report evaluates the status of civil rights oversight and policymaking by the White House and Office of Management on Budget (OMB) during the Nixon-Ford administrations, from 1972 to 1976. The report documents the activities of the White House, OMB, the Federal Regional Councils, and the Federal Executive Boards. Housing, school desegregation, business enterprises, and federal grants in relation to the prominent minority groups are investigated. The administration's failure to enforce Federal civil rights legislation during 1972-76 is attributed to the executive branch of government. This branch failed to provide policymakers with effective means to discover the nature of problems or to suggest ways to implement corrective action. In the belief that executive direction is indispensable to civil rights legislation, it is recommended that the President assume responsibility for Federal civil rights enforcement programs and that a cabinent-level position be created whose role would be to strengthen enforcement programs. It is also recommended that a Division of Civil Rights within the OMB be established. (KC)

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THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT--1974

Volume VII

To Preserve, Protect, and Defend
the Constitution

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
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SO 010 106

A Report of the United States Commission on Civil Rights

June 1977

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, sex, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

MEMBERS OF THE COMMISSION

Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman
John A. Buggs, *Staff Director*

LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C.
June 1977

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the status of civil rights oversight and policymaking by the White House and the Office of Management and Budget during the Nixon and Ford administrations, from 1972 to 1976. It also documents the civil rights activities of the two primary Federal field entities—the Federal Regional Councils and the Federal Executive Boards—with a potential for coordinating implementation of national civil rights policy. This report is the last in a series of seven volumes issued by this Commission describing the structure, mechanisms, and procedures utilized by Federal departments and agencies in their efforts to end discrimination against the Nation's minority and female citizens. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

This report is based on a review of documents produced by these agencies, interviews with Federal officials, and an analysis of available literature. A draft of the report was submitted to the agencies for review and comment prior to publication.

We have concluded in this report that many of the critical failings of the Federal civil rights enforcement effort, documented at length throughout the first six volumes of this series, were directly attributable to a void in the process by which civil rights policy is coordinated and executed within the executive branch. We found a continued absence of an effective means by which executive branch policymakers might apprise themselves of the exact nature of problems in civil rights enforcement and then take necessary corrective action. We believe that in order to achieve for all citizens those rights which our Constitution and civil rights laws promise, comprehensive executive oversight and direction are indispensable.

Since you have under consideration the reorganization of the White House and the executive branch, we hope that our findings, conclusions, and recommendations will be useful to you. Of major importance is our recommendation that the President assume responsibility for comprehensive oversight of Federal civil rights enforcement programs. To aid in this effort, this Commission believes that the President should appoint a cabinet-level official in the White House Office whose primary role would be to make recommendations to the President for strengthening Federal civil rights enforcement programs. The advisor should be assisted by several staff members who have expertise in a broad spectrum of civil rights concerns. The advisor should have clear authority from the President to instruct Federal agencies to take action to improve their civil rights programs. The advisor should have the authority to draw upon the resources of the Office of Management and Budget for assistance in evaluating Federal agency civil rights programs.

We also recommend that the President instruct the Director of the Office of Management and Budget to establish a Division of Civil Rights within the Director's office, headed by an official who will be responsible to the Director. The Division should assist agencies in setting measurable performance objectives with deadlines for upgrading their civil rights enforcement efforts. It should oversee Federal agency compilation and maintenance of civil rights information, develop a format for the regular submission of that information, and evaluate agency programs.

We urge your consideration of the facts and findings presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,
Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman
John A. Buggs, *Staff Director*

PREFACE

In October 1970 the Commission published its first across-the-board evaluation of the Federal Government's effort to end discrimination against American minorities. That report, *The Federal Civil Rights Enforcement Effort* , was followed by three reports, in May 1971, November 1971, and January 1973, which summarized the civil rights steps taken by the Government since the original report.

Beginning in December 1974, the Commission published the first of seven volumes of *The Federal Civil Rights Enforcement Effort—1974* , its most comprehensive analysis of Federal civil rights programs. The first of the volumes was on the regulatory agencies, the second on agencies with fair housing responsibilities, the third on the agencies concerned with equal educational opportunity, the fourth on the Office of Revenue Sharing of the Department of the Treasury, the fifth on agencies with equal employment responsibilities, and the sixth on Federal agencies with responsibilities under Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs or activities receiving Federal assistance. This seventh and final volume of the series is on Federal civil rights efforts in the area of policymaking.

This civil right enforcement study was begun in November 1972. As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance review reports, and books and reports authored by leading civil rights scholars. Volumes of data were also analyzed from sources including the census, agency data banks, complaint investigations, and recipient application forms. For the first time, Commission staff also talked to Federal civil rights officials in regional and district offices. With regard to the seventh volume, agency representatives were interviewed in Boston, Dallas, New Orleans, San Francisco, and Chicago.

In addition, this is the first of our studies on Federal enforcement activities to cover the Government's efforts to end discrimination based on sex. The Commission's jurisdiction was expanded to include sex discrimination in October 1972. Information on sex discrimination is an integral part of each section of this study.

The bulk of the research for this report was completed in mid-1976, although the Commission has continuously attempted to update material on salient issues until publication of the report. To assure the accuracy of this report, before final action the Commission forwarded copies in draft form to Federal agencies whose activities are discussed in detail to obtain their comments and suggestions. Their responses were helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to Commission staff investigations. Their comments have been incorporated in the report.

In cases where agencies expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their point of view, as well as that of the Commission, has been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

In the course of preparing this report, Commission staff interviewed numerous Federal officials and made a large number of demands upon Federal agencies for data and documents. The assistance received was generally excellent. Without it, we would not have been able to publish our views at this time. We further would like to note briefly that many of the Federal employees assigned civil rights duties and responsibilities should be commended for what they have done, considering the legal and policy limitations within which they have been working.

This report does not deal primarily with the substantive impact of civil right laws. The Commission will not attempt here to measure precise gains made by minority group members and women as a result of civil rights actions of the Federal Government. This will be the subject of other Commission studies. Rather, we will attempt to determine how well the Federal Government has done its civil rights enforcement job.

The purpose of this series of reports is to offer, after a careful analysis, recommendations for the improvement of those programs which require change. The Commission's efforts in this regard will not end with these reports. We will continue to issue periodic evaluations of Federal enforcement activities designed to end discrimination, until such efforts are totally satisfactory.

Acknowledgments

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This report was initiated under the overall supervision of Jeffrey M. Miller, formerly Assistant Staff Director for Federal Civil Rights Evaluation, and was completed under the overall supervision of Cynthia Norris Graae, Director, Office of Federal Civil Rights Evaluation. The following staff members and former staff members provided support in the preparation of this report: Raymundo Aleman, Brenda M. Blount, Alice R. Burruss, Patricia A. Cheatham, Wallace Greene, Deborah A. Harrison, Vivian M Hauser, Audree Holton, Betty Johnson, Jeanette M. Johnson, Carla Knapp, Mary V. Moore, Bruce E. Newman, Rita Higgins, Vivian D. Washington, Patricia A. Williams, Barbara Wortman, and Rita L. Young.

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Chapter 1

THE WHITE HOUSE

INTRODUCTION: THE PRESIDENT'S ROLE[1]

The functions of the Office of the President of the United States are myriad. For example, the President is the Commander in Chief of the armed forces,[2] the originator of much legislation,[3] and a major source of the country's foreign policy.[4] In general, the President must "take care that the laws be faithfully executed."[5] Moreover, the President's most significant duty, to provide leadership to the Nation, cuts across all specific powers and functions of the Presidency. The prominent journalist William Allen White wrote:

> From forty to sixty percent of the Presidential Office is not in administration but in moral, political and spiritual leadership. . . .he has much more to do than run the desk of the greatest corporation in the world. He has to guide a people in the greatest adventure ever undertaken on the planet.[6]

Many Presidents have commented upon the great importance of Presidential leadership. Franklin Roosevelt stated:

> The President is not merely an administrative office. That is the least part of it. It is more than an engineering job, efficient or inefficient. It is preeminently a place of moral leadership. All our great Presidents were leaders of thought at times when certain historic ideas in the life of the Nation had to be clarified.[7]

Harry S. Truman summed up the powers of the Presidency when he stated: "I sit here all day trying to persuade people to do the things they ought to have sense enough to do without my persuading them. . . ."[8] Theodore Roosevelt also noted that leadership was an important aspect of his political career:

> People used to say of me that I was an astonishingly good politician and divined what the people were going to think. This really was not an accurate way of stating the case. I did not "divine" how the people were going to think; I simply made up my mind what they ought to think, and then did my best to get them to think it.[9]

The President's responsibility to exercise leadership to cultivate positive attitudes toward the enforcement of the Nation's laws extends, of course, to civil rights laws,[10] making the President the single most important figure for ensuring enforcement of civil rights laws and for making certain that there is adequate legislation to protect the rights of minorities and women. As one scholar of the Presidency wrote:

---

[1] The first part of this chapter deals with the operation of the White House from Jan. 20, 1973, to Aug. 9, 1974. The second part assesses the operation of the White House from Aug. 9, 1974, to June 1976. President Richard M. Nixon resigned on Aug. 9, 1974, and Gerald R. Ford, the Vice President, on that date became President.

[2] U.S. Const., Art. III, §2.

[3] U.S. Const., Art. III, §3. For some views of the President's role in the lawmaking process, see E.E. Cornwell, Jr., *Presidential Leadership of Public Opinion* (1965); E.J. Hughes, *The Living Presidency* (1973); and L.W. Koening, *The Chief Executive* (1975).

[4] U.S. Const., Art. III, §2, cl. 2. For a general discussion of the roles of the President, see C. Rossiter, *The American Presidency* (1965); E.S. Corwin, *The President: Office and Powers*, 1789-1957 (1957); and G.E. Reedy, *The Twilight of the Presidency* 38 (1970).

[5] U.S. Const., Art. II, §3.

[6] *Selected Letters of William Allen White* 311 (1974).

[7] *New York Times*, Nov. 13, 1932, cited in E.J. Hughes, *The Living Presidency* 273 (1972).

[8] Cited in R.E. Neustadt, *Presidential Power* 9-10 (1960).

[9] Cited in Sidney Warren, *Saturday Review*, July 21, 1962.

[10] For an analysis of efforts made by the executive branch to effect compliance with civil rights laws prior to the Nixon administration, see Allan Wolk, *The Presidency and Black Civil Rights* (1971). This work also examines the civil rights attitudes of Presidents Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon and the effect of their attitudes on the enactment and enforcement of civil rights laws. For other discussions of the civil rights records of some past Presidents, see John W. Anderson, *Eisenhower, Brownell, and the Congress* (1974); Everett Frederic Morrow, *Black Man in the White House* (1963) (Eisenhower); William C. Berman, *The Politics of Civil Rights in the Truman Administration* (1970); Donald F. Sullivan, *The Civil Rights Programs of the Kennedy Administration* (1965); Arthur M. Schlesinger, Jr., *A Thousand Days* (1965) (Kennedy); Theodore Sorensen, *Kennedy* (1965); and James C. Harvey, *Black Civil Rights During the Johnson Administration* (1974).

> As for Constitutional guarantees, the President can be an important source in reminding the Nation of their existence and their value. Because of the publicity showered on his every move the President can associate his own image with positive attitudes toward the rights of individuals. He can, by carefully directed words of advocacy, set the tone of debate when liberty is under attack.
>
> . . .Where the law assists minority groups, as do the civil rights statutes and many courts decisions, he must make clear, without cavil or doubt, that it will be enforced.[11]

Although the White House has no specific enforcement powers, for example, to issue cease and desist orders, it exercises authority over Federal agencies which do.[12] The policies and posture of the President have a major effect upon the ability and desire of officials in Federal agencies to execute their civil rights responsibilities. Where Presidential leadership is lacking, civil rights enforcement suffers. As the Commission has previously noted, in the absence of adequate Presidential leadership the job of civil rights enforcement:

> . . .not only becomes infinitely more difficult, but a steady erosion of the progress toward equal rights, equal justice and equal protection under the Constitution will occur. History suggests that so long as one man is not free, the freedom of all is in jeopardy.[13]

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[11] R.P. Longaker, *The Presidency and Individual Liberties* 196 (1961).

[12] For example, the National Housing Act provides the Federal Savings and Loan Insurance Corporation (FSLIC) with authority to issue cease and desist orders to FSLIC-insured institutions, and the Federal Home Loan Bank Board has similar cease and desist authority with respect to Federal Savings and Loan Associations under Section 5(d) of the Home Owner's Loan Act of 1933. The Financial Institution Advisory Act of 1966 (12 U.S.C. §1464(d) (1970)) empowers the Federal Reserve System to issue cease and desist orders.

[13] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Efforts—A Reassessment* 11 (1973) [hereinafter referred to as *Reassessment* report].

Part A: November 1971[14] to August 1974

I. THE WHITE HOUSE STAFF

A. Organization

The President may draw for assistance upon a vast number of persons within the executive branch of the Government. These include executive agency heads, whom he appoints and can remove from office,[15] and occasionally the staff of those agencies.[16] The President is also served by the White House Office and by the Domestic Council staff.[17] Although the Domestic Council has a separate budget from that of the White House Office, its staff is generally regarded as an adjunct to the White House Office.[18] Indeed, closely affiliated with the White House is the entire Executive Office of the President, especially the Office of Management and Budget (OMB) whose officials sometimes function as an extension of the White House staff.[19]

As shown in exhibit 1.1, in fiscal year 1973 there were 1,813 employees in the Executive Office of the President.[20] They were distributed among several major agencies including 510 employees on the White House Office staff, 75 on the Domestic Council staff, and 660 at OMB. This staffing pattern represented a great increase from earlier years.[21]

Despite the size of the White House staff, there was no White House official whose exclusive concern was with the oversight of Federal civil rights enforcement. There was also no office in the White House responsible for a broad spectrum of civil rights concerns[22] although several officials had significant responsibility for promoting minority and women's interests, for example, Indian treaty claims, minority business enterprise, and employment of women and minority group persons in the Federal Government.

In the summer of 1973 four persons performed civil rights functions on a full-time basis for the White House.[23] At least one of these was actually on the staff of another agency.[24] Eight other persons

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[14] In November 1971 this Commission published a review of the White House in *The Federal Civil Rights Enforcement Effort—One Year Later* . There has been no Commission review of the White House since that time.

[15] For a discussion of the Presidential power to remove executive agency heads, see Meyers v. United States, 272 U.S. 52 (1926), as distinguished and limited in Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[16] For example, representatives from the Departments of Labor and Health, Education, and Welfare have assisted the White House to draft policy concerning welfare reform and protection of the rights of privacy. During 1973 and 1974, 52 Federal employees were detailed to the White House from other Federal agencies. *National Journal Reports* 967 (June 29, 1974).

[17] The purpose and functions of the Domestic Council are discussed in detail in sec. IV *infra* .

[18] Interview with Bradley H. Patterson, Jr., Executive Assistant to Leonard Garment, Assistant to President Nixon, the White House, June 7, 1974.

[19] These may include the Director and Deputy and Associate Directors of OMB. Many OMB offices are located in the Old Executive Office Building, the same building which houses a large number of White House staff. A detailed discussion of the Office of Management and Budget is contained in ch. 2.

[20] *Budget of The United States,* Fiscal Year 1975, Appendix.

[21] From 1967 through 1970 the White House Office had 250 positions and the total Executive Office, around 1,400 position. In fiscal year 1971, the White House Office staff increased dramatically to 533; the Executive Office, to 1,965. *Budget of the United States,* fiscal years 1969 through 1973. See also *U.S. News and World Report,* "Nixon's Top Command: Expanding in Size and Power," at 72–74 (Apr. 24, 1972).

The White House appeared to cultivate a certain confusion about the size of the Executive Office. For example, the fiscal year 1974 budget stated that in 1973 there were 4,250 permanent full-time Executive Office positions, including 1,935 from the Office of Economic Opportunity (OEO). *The Budget of the United States Government* , *Fiscal Year 1974* , at 29. The *Budget* stated that these positions would be reduced by 60 percent to 1,686 in 1974 which was to be accomplished largely by the abolition of OEO. *Id* . Detailed data on Executive Office staffing listed in the *Budget Appendices* , however, indicated that the Executive Office staff never included staff of the Office of Economic Opportunity and at its highest level the Executive Office contained no more than 2,185 staff members. The United States *Government Manual,* on the other hand, continuously listed OEO as part of the Executive Office. Moreover, critics challenged the *Budget* as an accurate source of information about the White House Office size. See *Congressional Quarterly.* "Executive Branch Personnel: The Revolving Door" 84 (Jan. 20, 1973).

[22] Prior to 1969 the White House civil rights assignments were even less structured. See, U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* 332–35 (1971) [hereinafter referred to as the *Enforcement Effort* report] and A. Wolk, *The Presidency and Black Civil Rights* 224–28 (1971). For a critical discussion of some of the attitudes and actions in the civil rights area of various other Presidents, see generally Wolk, *supra* . Also see J.M. Burns, *Roosevelt: The Soldier of Freedom* 123, 264–66, 462–63, 472 (1970); W.O. Douglas, *Go East, Young Man* 347–48 (1974); W.C. Berman, *The Politics of Civil Rights in the Truman Administration* (1970); B. J. Bernstein, "The Ambiguous Legacy: The Truman Administration and Civil Rights," in *Politics and Policies of the Truman Administration* 269–314 (1970); P. Lyon, *Eisenhower: Portrait of the Hero* 554–63, 740–43, 779–81 (1974); E. J. Hughes, *The Ordeal of Power* 201, 241–43, 261 (1963); J.W. Anderson, *Eisenhower, Brownell, and the Congress* (especially 28–54) (1964); V.S. Navasky, *Kennedy Justice* 97–98, 204–07 (1971); J. C. Harvey, *Black Civil Rights During the Johnson Administration* (1973).

[23] These were Stanley S. Scott, Special Assistant to the President; Robert Robertson, Assistant to the Vice President and Executive Director of the National Council on Indian Opportunity (NCIO); Fredric W. Slight, Liaison for Presidential Counsellor Anne L. Armstrong with the Cabinet Committee on Opportunities for Spanish Speaking People; and Vera Hirschberg, Director of Women's Programs for Counsellor Armstrong. White House response to U.S. Commission on Civil Rights April 1973 questionnaire, contained in a letter from Leonard Garment, Special Consultant and Acting Counsel to the President, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 14, 1973, [hereinafter referred to as 1973 White House response].

Note: in referring to titles, the Commission has attempted to use official titles at the time(s) referred to in the report. Thus, for example, where the text speaks of Mr. Leonard Garment in 1971 he is referred to as "Special Consultant to the President" and in 1973 as "Special Consultant and Acting Counsel to the President."

[24] Fredric Slight was on the staff of the Cabinet Committee on Opportunities for Spanish Speaking People until May 1974. Until that time, he viewed his responsibilities as those of the Cabinet Committee rather than of the White

Exhibit 1.1

Executive Office of the President
Actual Total Full-Time Positions
Fiscal Year 1973

White House Office	510	Domestic Council	75
Executive Residence	75	National Security Council	79
Special Assistants to the President	39	Office of Management and Budget	660
Council of Economic Advisors	64	Office of Telecommunications Policy	65
Council on Environmental Quality	56	Special Action Office for Drug Abuse Prevention	116
Council on International Economic Policy	29	Special Representative for Trade Negotiations	45
		Total	**1,813**

Source: *Budget of the United States*, Fiscal Year 1975, Appendix.

devoted 25 percent or more of their time to civil rights,[25] and when not working on civil rights carried out a variety of other responsibilities.[26]

Only one member of the White House staff with civil rights functions was black[27] and only three were women.[28] There were no members of Spanish origin[29] and no Native Americans. There was one Asian American.[30] Collectively, the White House staff appeared to spend annually fewer than 10 person-years on civil rights. This was not an appreciable improvement over the figure of 1971.[31]

House and, in a larger context, for the Spanish speaking people. When Mr. Slight became an official member of Ms. Armstrong's staff, he assumed responsibilities in addition to those for persons of Spanish origin and apparently unrelated to civil rights. Mr. Slight would not reveal what those responsibilities were, stating his belief that they were irrelevant to the purpose of this report. Interview with Fredric W. Slight, Special Assistant to Counsellor Armstrong, the White House, June 17, 1974.

[26] 1973 White House response, *supra* note 23. They were Leonard Garment, Special Consultant and Acting Counsel to the President (75 percent of his time); Bradley H. Patterson, Jr., Executive Assistant to Mr. Garment (90 percent); Anne L. Armstrong, Counsellor to the President (25 percent); Jill Ruckelshaus, Consultant to Counsellor Armstrong (100 percent of her consulting time, i.e., 3 days a week); Barbara Kilberg, Consultant to Ms. Ruckelshaus, (100 percent of her consulting time); James H. Cavanaugh and Dana G. Mead, Associate Directors of the Domestic Council (25 percent each); and Clarence D. Ward, Assistant to the Vice President (25 percent).

[26] For example, Leonard Garment advised President Nixon on various other matters including arts and humanities, the forthcoming bicentennial celebration, and cable television. Anne L. Armstrong, as Counsellor to the President, served as a general advisor to President Nixon; a liaison between President Nixon and the public; a member of the Domestic Council, the Cost of Living Council, and the committee coordinating foreign policy; and Chairman of the Federal Property Council.

[27] He was Stanley S. Scott, one of approximately 12 Special Assistants to President Nixon.

[28] These women were Anne L. Armstrong, Jill Ruckelshaus and Barbara Kilberg. See note 23 *supra*.

[29] White House personnel having overall responsibility for the Spanish speaking have often been Anglos from geographic areas of large Spanish-speaking populations. Thus, responsibility for the concerns of the Spanish speaking once belonged to Robert H. Finch, Counsellor to the President, who was from California. It later became the responsibility of Anne L. Armstrong, Counsellor to the President, who was from Texas.

[30] William H. Marumoto, formerly the highest-ranking Asian American in the White House, who worked principally in the area of opportunities for the Spanish speaking, was not mentioned in any of the White House responses. Mr. Marumoto, who grew up with Mexican Americans from the barrios of southern California, came to Washington as an assistant to the Secretary of the Department of Health, Education, and Welfare when Robert Finch was Secretary. In 1970, he went to the White House as part of an executive recruiting team, which concentrated on locating minorities, principally black and Spanish speaking, to work for the Government. Mr. Marumoto stated that he had closely monitored programs of concern to Spanish-speaking people, such as minority business enterprise aid. Interview with William Marumoto, former White House Staff Assistant, Oct. 21, 1973. It later appeared, at least with regard to the period of the re-election campaign, that these activities were primarily directed at obtaining votes to re-elect President Nixon. See testimony of William H. Marumoto before the Senate Select Committee on Presidential Campaign Activities, Nov. 7, 1973. Mr. Marumoto resigned from the White House and returned to private employment in late August 1973.

[31] In April 1971 four persons, including Leonard Garment, Special Consultant to the President, and Robert Brown, Special Assistant to the President, spent more than 50 percent of their time on civil rights. Six persons, including Robert Finch and Donald Rumsfeld, Counsellors to the President, spent between 25 and 50 percent of their time on civil rights. White House response to U.S. Commission on Civil Rights questionnaire contained in a letter from Leonard Garment to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Apr. 15, 1971 [hereinafter referred to as April 1971 White House response]. By October 1971 the White House had more than doubled its allocation of staff to civil rights, with an annual total increase of more than three person years, with nine persons devoting more than 50 percent of their time to civil rights and four, more than 25 percent. See response to U.S. Commission on Civil Rights questionnaire, contained in a letter from Leonard Garment to Theodore M. Hesburgh, Oct. 7, 1971 [hereinafter referred to as October 1971 White House response].

Prior to the 1972 election, in addition to staff named *supra*, Robert H. Finch, Counsellor to the President, was responsible for Spanish-speaking programs. Working with him were Special Assistant to the President Charles W. Colson and staff assistant William H. Marumoto. Mr. Colson, during the election campaign of 1972, was responsible for certain special interest groups, such as women, youths, veterans, the elderly, and racial/ethnic minorities. Mr.

During fiscal year 1974 there was a considerable turnover in the White House civil rights staff. Apparently the turnover resulted in a further decrease in the size of that staff to four full-time and five part-time staff persons. Three of the eight persons with part-time civil rights responsibilities in 1973 had left the White House by July 1974,[32] and only one of the four persons with full-time civil rights responsibilities in 1973 remained at the White House.[33] Of the three full-time persons who left, one resigned and was replaced[34] and two were in full-time civil rights positions which were being abolished. Two new full-time positions were created.[35] There appear to have been no other additions which would have increased the size of the civil rights staff.[36]

The White House civil rights staff were located in at least five different organizational units within the White House: the Office of Leonard Garment, Assistant to the President;[37] the Office of Anne L. Armstrong, Counsellor to the President;[38] the Office of Stanley S. Scott, Special Assistant to the President; the Domestic Council; and the Vice President's staff.

This structure was divisive, creating competition among constituent groups, sometimes focusing attention upon status within the White House rather than upon the resolution of issues of common concern such as employment discrimination and lack of adequate health care and housing. Three of these units were responsible for only one or two target groups. Counsellor Armstrong's office focused on persons of Spanish origin and women, and even within her office separate staffs handled each function. Mr. Scott's office focused on blacks and, until June 1974,[39] the Vice President's staff, was responsible for issues relevant to Native Americans. Moreover, for persons of Spanish origin[40] and Native

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Marumoto's chief responsibility was the recruitment of persons of Spanish origin for high level Federal positions. He also participated in preelection efforts to provide grants for Spanish-speaking communities.

[32] These are C.D. Ward, who left the Vice President's Office after Mr. Agnew's resignation; Jill Ruckelshaus, who resigned from the Office of Women's Programs on Mar. 18, 1974; and Barbara Kilberg, who although listed as a consultant on the White House books, was not actively consulting for the White House in June 1974.

[33] This is Stanley Scott.

[34] Vera Hirschberg resigned from the White House staff May 15, 1974. Her replacement, Karen Keesling, was appointed in mid-July 1974.

[35] After May 1974 Fredric Slight spent only 7½ percent of his time on civil rights and gradually ceased this activity altogether when a special assistant to President Nixon was appointed to work on Spanish-speaking affairs. The position of a new special assistant was approved by President Nixon in April 1974. 1974 Slight interview, *supra* note 24. Fernando E. C. DeBaca, of Albuquerque, N. Mex., was appointed to this position on July 19, 1974. Vice Presidential activities on Indian affairs ceased shortly after the Oct. 10, 1973, resignation of Spiro T. Agnew as Vice President, and the National Council on Indian Opportunity (NCIO) was disbanded as of June 30, 1974, (see sec. II(D) *infra* .) Thus, Robert Robertson's activities as special assistant to the Vice President and chairman of NCIO were abolished. 1974 Patterson interview, *supra* note 18. Patricia Sullivan Lindh was appointed to the White House on June 6, 1974, as special assistant to Counsellor Armstrong for Women's Programs. Ms. Lindh was a former Republican National Committeewoman from Louisiana. Ms. Lindh replaced Jill Ruckelshaus, who worked only part-time (see note 25 *supra*). Ms. Lindh, however, was a full-time White House employee.

[36] In late Spring 1974, Geoffrey Shepard, Associate Director of the Domestic Council, acquired civil rights duties, but these were not new to the Domestic Council. They had formerly been the responsibility of Dana Mead, who as of that time ceased to have duties in that area. On Sept. 4, 1973, Nola Smith joined the White House staff to handle recruitment of women for White House and other high level Federal positions, but her resignation was announced in the spring of 1974, effective July 1974. As of July 22, 1974, no one had been appointed to fill the position. After Mr. Agnew's resignation, one of his research analysts, Jean Spencer, was transferred to Counsellor Armstrong's staff to work on the Women's Program. Dr. Spencer resigned from the White House staff June 19, 1974. That summer, Norman Ross, Assistant Director for Natural Resources, the Domestic Council, was given responsibility for a Domestic Council Committee on Indian Affairs to replace NCIO (see note 35 *supra*). Mr. Ross's responsibilities were to be part-time. He was also responsible for committees on land usage, national ocean policy, and environmental resources. His responsibilities further included the Trust Territory of the Pacific Islands, the Virgin Islands, and Puerto Rico.

[37] Mr. Garment was appointed assistant to the President in January 1974. He was one of approximately seven assistants to President Nixon. Mr. Garment's "civil rights" activities, however, were not always focused on the rights of minorities and women. For example, the White House considered his activities concerning Federal poverty programs as significant among his civil rights duties. 1974 Patterson interview, *supra* note 18. Mr. Patterson noted that Mr. Garment spent much of his time in an attempt to secure the establishment of a Legal Services Corporation. *Id* . Legislation for the proposed corporation was sent to Congress by the Nixon administration on May 11, 1973. 1973 White House response, *supra* note 23. Mr. Garment was also attempting to determine the future of Community Action Program agencies once funded by the Office of Economic Opportunity. These were not, strictly speaking, civil rights activities despite their relevance to minorities and women. It is true that poverty disproportionately affects minorities and women, but in absolute terms, the largest group of persons affected by these are white males. For example, in 1970, 2.5 million families in this country had incomes below the poverty level and almost half of these families were headed by white males. U.S. Department of Commerce, Bureau of the Census, *Census of Population: 1970, General Social and Economic Characteristics,* Final Report PC (1)-C1, *United States Summary,* table 95. Poverty is defined by the Bureau by using such factors as family size and farm and nonfarm residents. See U. S. Department of Commerce, Bureau of the Census. *Current Population Reports,* Series P. 23, No. 28, *Revision in Poverty Statistics 1959 to 1968* .

[38] Ms. Armstrong was one of two "counsellors to the President" in the Nixon administration. President Nixon also had counsellors who served in specific areas such as community development, domestic affairs, human resources, and national resources. Ms. Armstrong, appointed in December 1972, became the first female counsellor to President Nixon. She was formerly cochairman of the Republican National Committee.

[39] See note 35 *supra* .

[40] On Dec. 30, 1969, Congress established the Cabinet Committee on Opportunities for Spanish Speaking People (42 U.S.C. §§4301-4312 (1970)) to be the successor to the Inter-Agency Committee on Mexican American

Americans,[41] the White House occasionally used special committees to the Cabinet rather than White House staff to conduct some of its activities.

Such a structure was inefficient. This fragmentation of civil rights responsibilities also resulted in a weak civil rights program with inconsistent oversight of civil rights enforcement. For example, when the Office of Women's Programs requested Federal agencies to supply it with data on the sex of Federal employees, it failed to solicit those data by race and ethnic origin.[42] If the request had emanated from a civil rights office with responsibilities for both women and minorities, such an omission would have been less likely to occur.

Similarly, when the Office of Women's Programs commented on behalf of the White House upon proposals to outlaw discrimination in the granting of credit, it argued that such a prohibition should be limited to sex and marital status.[43] It would appear that because of its limited mandate and isolation from other White House civil rights efforts, the Office of Women's Programs failed to recognize the need for legislation prohibiting discrimination in the granting of credit based on race, color, and national origin. It failed to take into account in its comments, not only the fact that racial and ethnic minorities—especially women—suffer because of credit discrimination[44] but also that no Federal law specifically prohibits discrimination in all credit transactions on the basis of race or national origin.[45]

Another example of disorganization of White House civil rights responsibility occurred in December 1972, when the Attorney General sent to President Nixon a set of revised Federal agency regulations implementing Title VI of the Civil Rights Act of 1964. The regulations were not filed by the White House for publication in the *Federal Register* until July 3, 1973.[46] The delay, which caused serious setbacks to Federal agency Title VI programs, was apparently not due to controversy about whether the regulations should be signed, since they were originally signed by the President on January 27, 1973. However, they had been sent to the files rather than forwarded to the *Federal Register*,[47] and the error was not discovered until June 1973.[48] Only in an agency with civil rights responsibilities scattered throughout several units, with limited access to the chief decisionmaker and with no central source of accountability, could such an error remain unnoticed for almost 6 months.

With the possible exception of the President, it appears that no single person in the White House was aware of the entire scope and size of White House civil rights efforts. Although the ostensible focal point for civil rights was in Mr. Garment's office, that office had, at least on occasion, been uninformed about some important aspects of the White House civil rights program, such as the names and responsibilities of the White House civil rights staff.[49] Without a single office serving as a focal point to

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Affairs. The Inter-Agency Committee, created in June 1967 by President Lyndon B. Johnson, is discussed in the *Enforcement Effort* report, *supra* note 22, at 316-318. The change of name was in line with the expansion by Congress of the Committee's purview to include all Spanish-speaking groups, not just Mexican Americans. The purpose of the Cabinet Committee was to advise Federal departments and agencies (1) On appropriate action to help assure that Federal programs are providing the assistance needed by Spanish-speaking and Spanish-surnamed Americans; and (2) on the development and implementation of comprehensive and coordinated policies, plans, and programs focusing on the special problems and needs of Spanish-speaking and Spanish-surnamed Americans. The Cabinet Committee ceased to exist on Dec. 16, 1974, pursuant to its enabling statute 42 U.S.C. §4312 (1970). The Cabinet Committee is discussed in part A, sec. II(B) *infra* and part B, sec. II(B) *infra*.

[41] The National Council on Indian Opportunity (NCIO) was established by President Lyndon B. Johnson in March 1968. The mission of NCIO was to: (1) encourage full use of Federal programs to benefit the Indian population, adapting such programs where necessary for Indians on reservations; (2) encourage interagency coordination and cooperation in carrying out Federal programs as they relate to Indians; (3) appraise the impact and progress of Federal programs for Indians; (4) suggest ways to improve such programs. Exec. Order No. 11399, as amended by Exec. Order No. 11551, 3 C.F.R. 1966-1970 Comp., pp. 717, 953. Aug. 11, 1970.

[42] This data collection effort is discussed further in ch. 2, sec. V *infra*. The need for the cross-tabulation of racial, ethnic, and sexual data is discussed in ch. 2, sec. V(A) *infra*.

[43] As a result of advice from the White House Office of Women's Programs, the administration provided support to proposed legislation which prohibited credit discrimination on the basis of sex and marital status but not on the basis of race, color, or national origin. Telephone interview with William Skidmore, Chief, Business and General Government Branch, Legislative Reference Division, OMB, July 7, 1974.

[44] As noted in Commission testimony regarding the Equal Credit Opportunity Act, minorities are faced with discrimination in all areas of credit. Statement of Arthur S. Flemming, Chairman, U. S. Commission on Civil Rights, before the Subcomm. on Consumer Affairs of the House Banking, Currency, and Housing Comm., June 21, 1974. The need to address racial/ethnic discrimination in this legislation is discussed in a letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Leonor K. Sullivan, Chairwoman, Subcomm. on Consumer Affairs, House Banking, Currency, and Housing Comm., July 9, 1974.

[45] Although Title VIII of the Civil Rights Act of 1968 prohibits discrimination against racial and ethnic minorities in mortgage lending, there was no Federal law prohibiting racial or ethnic discrimination in credit transactions such as department store credit, credit cards, personal loans, and business loans.

[46] President Nixon's signature was dated June 15, 1973. The regulations were promulgated 6 years after an interagency task force recognized the need and 18 months after they were issued as a proposed rulemaking. See *Reassessment* report, *supra* note 13, at 71.

[47] Interview with Bradley H. Patterson, Jr., executive assistant to Leonard Garment, the White House, June 17, 1973.

[48] *Id*.

[49] For example, the 1973 White House response (*supra* note 23), prepared by Mr. Garment's office, indicated that Dana Mead spent 25 percent of his time on civil rights. An interview with Dana Mead 2 months after the response was written, however, indicated that Mr. Mead spent only 10 percent of his time on such matters. Interview with Dana Mead, Associate Director, Domestic Council, July 31, 1973. Moreover, in May 1974 Mr. Mead's civil rights responsibilities were transferred to Geoffrey Shepard, another of the

which all civil rights issues were directed and which was knowledgeable about significant details of the activities and assignments of all White House offices with civil rights duties, it was difficult for the President to ensure that the program was carried out with sufficient foresight and planning.

B. Duties

The civil rights staff had many duties. Their primary task was to serve as the eyes and the ears of the President. At any level they may have been called upon to serve as liaison to various Federal agencies, prepare and deliver speeches, write articles, represent the White House at functions in this country and abroad, collect information, consider problems and propound alternate solutions, act as troubleshooters for ongoing critical problems, and serve in the role of ombudspersons to handle inquiries from citizen groups and act as liaison between the White House and special interest groups.

Top officials in the White House, such as those of the status of Mr. Garment and Ms. Armstrong, and associate directors in the Domestic Council may have also assisted in the development of national policy, served as advisors to President Nixon, and overseen the drafting of legislation. Even at the highest levels, however, civil rights assignments appear to have been undertaken not as a result of long-range planning, but, rather, in response to complaints, requests, or suggestions from outside the White House or to critical situations, such as the occupation by the Trail of Broken Treaties Caravan of the Washington headquarters of the Bureau of Indian Affairs (BIA) in November 1972.[50]

Thus, White House civil rights staff members were for the most part reactive rather than active agents. They responded rather than initiated. Furthermore, where they set priorities for their offices, this was not done on the basis of a systematic review of the issues, but on a perception of the issues shaped largely by ideas and problems brought to their attention by persons outside the White House. The White House itself acknowledged that although the general responsibilities of the civil rights staff, "are on-going. . .the specific work is almost entirely ad hoc."[51] It reported:

> Every White House staff officer plays. . .[the role of ombudsperson] to some extent: letters and phone calls arrive which are in effect pleas for special intervention in cases where the Federal machinery is alleged to have treated an individual or a specific organization unfairly. Some are worthy of intervention and this is done; many are not, or can be handled directly by responsible Departments and agencies when the problem is brought to their attention. But taken together, "ombudsman" type requests are an unavoidable consumer of White House man-hours.[52]

There are dangers in such an arrangement as it can only lead to executive neglect of civil rights issues. Plainly, the arrangement largely precluded any system within the White House Office, because the ad hoc projects[53] undertaken by civil rights staff members occupied the bulk of their time. Indeed, White House officials generally indicated either that they had no list of immediate priority concerns,[54] or that if they were to draft such a list, it would represent, not the plans for their office or other Federal agencies, but only matters with which they felt, in the abstract, that someone should have been dealing.[55]

On the whole, the White House did not systematically exercise responsibility for the following minimum elements of a program necessary to ensure civil rights leadership: (l) the regular, comprehensive collection and cataloguing of civil rights issues; (2)

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associate directors of the Domestic Council. More than 5 weeks after this transfer, Mr. Garment's office was unaware that it had taken place. See 1973 Patterson interview, *supra* note 47.

[50] In November 1972 the Trail of Broken Treaties Caravan, a caravan of Native American representatives, arrived in Washington to persuade the Federal Government to make significant changes in the administration of Indian affairs in the foreseeable future. The caravan ultimately took possession of the Bureau of Indian Affairs headquarters in Washington. Mr. Garment's office participated in negotiations with Native American leaders of the caravan to end the occupation. The use of deadly force was avoided. 1973 White House response, *supra* note 23. The events surrounding the caravan to Washington are chronicled in Indian Legal Information Development Service, 2 *Legislative Review* no. 1, November 1972. The entire issue is devoted to the Trail of Broken Treaties Caravan.

[51] April 1971 White House response, *supra* note 31.

[52] *Id*. See also 1974 Patterson interview, *supra* note 18.

[53] As one noted scholar of the Presidency has written about ad hoc attention to human rights:

> Executive neglect. . .may lead to the undermining of the very substance of American constitutionalism. What must be recognized today is that sustained leadership in the field must originate in White House direction, coordination, and sensitivity. . . .the problems in this field are least effectively solved by drastic expedients imposed at the final moment. Longaker, *supra* note 11, at 171.

[54] For example, see interview with Fredric Slight, liaison for Counsellor Armstrong with the Cabinet Committee on Opportunities for Spanish Speaking People, June 12, 1973.

[55] See, for example, interview with Vera Hirschberg, Director of Women's Programs for Counsellor Armstrong, the White House, June 28, 1973, and interview with Stanley S. Scott, Special Assistant to the President, the White House, July 17, 1973.

the formulation of Presidential civil rights policy through the establishment of priorities and the use of goals and timetables; (3) the monitoring and evaluation of Federal civil rights laws and the degree to which minorities and women are among the beneficiary population of various Federal programs and projects; (4) the evaluation of the implementation of administrative regulations and guidelines; (5) the drafting, review, and the recommending of legislation, both to strengthen existing law as weaknesses are perceived and to propose new laws to manage or resolve emerging civil rights issues and concerns; and (6) the coordination of administration policy and agency action.

II. ADVOCACY

The White House staff division of responsibilities reflects the fact that its activities were often addressed toward a single group, rather than toward minorities and women as a group. This section attempts to analyze the adequacy of the activities pertaining to specific groups.

A. Blacks

White House activities relating to blacks were undertaken in a number of offices, including Leonard Garment's office and in the Domestic Council. For example, Mr. Garment's office wrote an option paper for the Domestic Council concerning Soul City, N.C., a new community managed and owned principally by blacks.[56] However, the focal point in the White House advocating the interests of blacks was the office of Stanley S. Scott, a Special Assistant to the President. Among Mr. Scott's regular duties were assisting the White House personnel office to locate blacks[57] for Federal employment and helping to ensure that blacks were represented at State dinners, in Presidential meetings with the press and other groups, and on overseas military inspection tours.[58]

Although some of Mr. Scott's activities related to all minorities, he saw himself as "the Black Special Assistant to the President,"[59] a position he assumed in February 1973, after more than a year and half as assistant to the Director of Telecommunications for the executive branch.[60] He viewed his job as a logical extension of the duties of his earlier office—to maintain open lines of communication between the White House and the minority community, to articulate Presidential policy to minorities, and to relay issues of concern from minorities to President Nixon and the Domestic Council.[61]

Approximately 20 percent of Mr. Scott's time was spent on travel and speeches. His travels, for example, took him to the Bahamas, where he represented the Government at the celebration of that nation's independence, and to Liberia, where he was a member of the U.S. delegation attending the Liberian President's funeral.[62]

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[56] The Soul City Company was the first nonsuburban community of its kind to receive Federal assistance, and the first to be conceived, managed, and principally owned by blacks. Floyd McKissick, former head of the Congress of Racial Equality, conceived the new town concept as an alternative for blacks and whites migrating from a failing agricultural economy to the industrial centers of the North. In mid-1973 the Nixon administration announced support of Mr. McKissick's proposal, and on Feb. 27, 1974, HUD announced a $14 million Federal guarantee for Soul City bonds. As of July 1974 Soul City had sold $5 million worth of bonds and was ho[illegible] additional $9 million. Soul City also received funds from other Federal agencies. Healthco, a nonprofit health organization in Soul City, for example, received a $1 million, 5-year Federal grant. Healthco was initially funded by OEO, but was later taken over by HEW. The Regional Planning Corporation of Soul City is also a recipient of Federal funds. It has received $333,000 from the Office of Minority Business Enterprise (OMBE) to assist and attract minority enterprises. The grant also affords black contractors an opportunity to participate in the building of the town. Telephone interview with Charles Allen, general manager, Soul City Company, Soul City, N.C., July 22, 1974.

[57] Several former White House employees have indicated their belief that the White House personnel office was not sensitive to the need for increased minority and female employment. One individual noted that in 1973 there were no blacks, Asian Americans, or employees of Spanish origin, except one person of Cuban origin, in the personnel office. Another stated that when the White House personnel office was asked for names of persons for appointment to advisory committees, "it always comes up with men."

[58] Scott interview, *supra* note 55. Mr. Scott was not the first person to serve this role in the White House. Robert J. Brown, his predecessor, had similar functions. Mr. Brown indicated that these were generally of an ad hoc nature. Among his duties, he evaluated various types of day care centers that the Federal Government could fund and assisted Federal agencies to structure assistance programs for black colleges. Interview with Robert Brown, Special Assistant to the President, Apr. 9, 1970; cited in the *Enforcement Effort*, *supra* note 22.

In the Eisenhower administration, E. Fredrick Morrow held a similar position in the White House. His duties included numerous speeches to black groups across the country, and he attended many White House staff meetings related to race relations. However, he was not in a direct policymaking position that would affect the lives of blacks. Mr. Morrow saw his position as "trying to convince the President and other high officials" how blacks felt on matters of concern to them. For a further discussion of his role, see E. Fredrick Morrow, *Black Man in the the White House: A Diary of the Eisenhower Years by the Administrative Officer for Special Projects, The White House 1955–1961* (1963).

[59] Scott interview, *supra* note 55.

[60] Prior to the 1972 election, both Mr. Brown, as Special Assistant to the President, and Mr. Scott, who was then a White House Communications staff member, were part of an administration team working towards Mr. Nixon's re-election. White House, "Campaign Plan—A Strategy for the Development of the Black Vote in 1972." Mar. 15, 1972, cited in the final report of the Select Committee on Presidential Campaign Activities, Pursuant to S. Res. 60, Feb. 7, 1972 (1974). The memorandum concludes:

> In support of staff efforts it is proposed that emphasis be placed on closer control of grants, loans, contracts and appointments—especially from socially-oriented Departments and agencies. What the Administration does economically is key. The major issues of concern to the rank and file Black voter are those which have an economic base. They are concerned about those things that affect day to day livelihood and well-being.

[61] *Id*. To develop these lines of communication, Mr. Scott, shortly after entering office, mailed 45,000 form letters to minorities inviting correspondence on anything of concern. In these letters, Mr. Scott acknowledged that his position as White House assistant was to act as a "close liaison" with other staff members and to relate to them "the best thoughts and opinions from the nongovernment sector." Letter from Stanley S. Scott, Special Assistant to the President, to Fellow Americans, Apr. 16, 1973.

The remaining 80 percent of his time was devoted to day-to-day duties. Copies of practically all inquiries and complaints from minorities coming through the White House mail arrived at his desk. These extended to such matters as minority entrepreneurship, Federal employment, and the military. Mr. Scott believed he was regarded both from within and without the White House as the resident expert on blacks.[63] Moreover, because there were other offices[64] within the White House whose regular function was to lobby for various groups, he saw as part of his role " going to bat for a group of people,"[65] helping to ensure that departments and agencies provided blacks with "a concrete piece of the action."[66] For example, he assisted several minority persons to secure reinstatement of Small Business Administration (SBA) 8(a) contracts,[67] and he put a group of public school teachers who complained of employment discrimination in touch with appropriate Federal officials.[68] Similarly, Mr. Scott played a role in the HUD housing moratorium.[69] After receiving numerous letters from minority contractors, he contacted HUD and made it possible for some contractors whose projects had been approved but not funded to have their projects reinstated.[70]

Mr. Scott's office frequently commented on proposed legislation, regulations, and guidelines. For example, his office was consulted during formulation of an administration proposal to the Congress on housing.[71] In conjunction with this, Mr. Scott often brought in experts from the private sector to meet with agency officials. Areas which Mr. Scott would have liked to address but had not as of the summer of 1973 were the creation of job opportunities for minorities, increased funding of health care, more and better low-income housing, and job training for "meaningful employment."[72]

Although this office had contact with Cabinet members and agency heads, as well as other staff members within the White House Office and the Domestic Council, these contacts were primarily for exchange of information and seem rarely to have been used for consultation with Mr. Scott on policy formulation. Mr. Scott's office was operated basically in an ad hoc manner and played little or no role in policymaking, which was centered largely in the Domestic Council.[73]

Indeed, with the possible exception of minority business enterprise,[74] Mr. Scott was not a key figure in the formation of White House policy on issues, such as school desegregation,[75] which were of special concern to blacks.[76] Mr. Scott, nevertheless, made a personal commitment to long-range objectives for the black community, focusing especially on minority entrepreneurship and employment.[77] However, his office had little significance for Federal civil rights enforcement. Mr. Scott's duties were nearly all related to civil rights and minority group affairs but not to monitoring the enforcement of civil rights laws and policies.

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[62] Scott interview, *supra* note 55.

[63] *Id*.

[64] These offices are discussed *infra* , this section.

[65] Scott interview, *supra* note 55.

[66] *Id* Mr. Scott spoke with particular reference to the Department of Commerce, especially its Office of Minority Business Enterprise, and to the Small Business Administration.

[67] Section 8(a) of the Small Business Act provides for the award of procurement contracts to minority firms on a noncompetitive basis; the deposit of agency operating monies in minority-owned banks; and the establishment of minority-owned concessions in Federal buildings. These contracts are not intended to support a minority enterprise firm indefinitely, but to serve as an adjunct to assist in its development.

[68] Scott interview, *supra* note 55.

[69] This moratorium is discussed in sec. V(D) *infra* .

[70] Scott interview, *supra* note 55.

[71] *Id* .

[72] President Nixon's housing message to the Congress was delivered in September 1973.

[73] Mead interview, *supra* note 49. Mr. Mead noted that although the issues drafted within Mr. Scott's office were not the current policy concerns of the White House, Mr. Scott may have uncovered problems which would have led to new policy formation by the Domestic Council.

[74] White House accomplishments in the area of minority business enterprise are discussed in sec. V(E) *infra* .

[75] Presidential policy on school desegregation is discussed in sec. V(C) *infra* .

[76] For a discussion of such issues, see Congressional Black Caucus, *Report to the Nation* , May 24, 1971. The Congressional Black Caucus identified a number of issues of importance to the black community: (1) employment training and employment rights such as the creation of more jobs in the public sector and basic employment rights for the worker; (2) welfare reform that would guarantee a family of four an annual income of $6,500; (3) Federal assistance to State and local governments through short-term assistance programs for both long-range and short-range development projects; (4) minority economic development programs that would be assisted by a nonprofit, publicly-funded development bank; (5) poverty programs that would support the continued existence and expansion of the Office of Economic Opportunity, especially its legal assistance program; (6) increased educational programs that would include legislation on day care facilities and the strong enforcement of Title I of the Elementary and Secondary Education Act of 1965; (7) housing and urban development programs that would increase substantially the amount of low- and moderate-income housing for the displaced; (8) strong legislation that would utilize existing resources to stop the illegal entry of drugs into the U.S., and additionally to fund allocation for mobile detoxification and rehabilitation centers; (9) fundamental improvement and reforms in the criminal justice process reflective of minority concerns; (10) new legislation that would establish a Civil Rights Division within the Department of Defense and prescribe by law the staffing, funding, and procedures for handling racial discrimination complaints of military personnel; (11) foreign aid to African nations and the use of American business interests in apartheid nations to influence improved conditions for blacks; and (12) full political participation for District of Columbia citizens. *Id* .

[77] Scott interview, *supra* note 55.

B. Persons of Spanish Origin

Despite the many areas of concern to citizens of Spanish origin that merit the attention of policymakers,[78] there was little activity on their behalf within the White House. Much of the work was left to the Cabinet Committee on Opportunities for Spanish Speaking People (CCOSSP),[79] especially the functions of advocate and ombudsperson.[80]

In the first half of fiscal year 1973, CCOSSP worked on or considered problems of education; Spanish origin migrant workers and their health, housing, and education needs; institutionalization of a program for increasing employment of Hispanic persons in the Federal Government; regionalization of the Committee's efforts; and the national implications for Hispanics of general revenue sharing.[81]

Like Stanley Scott's office, however, the Committee placed major emphasis on Federal employment and minority business enterprise.[82] Nevertheless, it had no authority to enforce laws protecting the rights of persons of Spanish origin[83] and little power to influence other Federal agencies.[84] Few Cabinet members attended Cabinet Committee meetings.[85] Although by law the Committee was required to meet at least quarterly during each year,[86] as the liaison between the Cabinet Committee and Ms. Armstrong's office noted, it was "hard for anyone but the President to get. . .[departmental secretaries]. . .together in the same room."[87]

In fact, CCOSSP held only seven meetings in the first 5 years of its existence.[88] Minutes have been published for three of those meetings, which show that they accomplished little[89] and were used only as a forum to make general accouncements or conduct broad discussions. Policy decisions were not made at these meetings. Moreover, the Committee failed to make maximum use of the little opportunity it had to effect change for persons of Spanish origin. For example, in its annual reports the Committee did not make any recommendations to improve conditions of people of Spanish speaking-background, although Section II of its statute authorized such recommendations.[90]

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[78] These included increased budgeting for bilingual public school education, particularly for training bilingual educators; review of OMBE and SBA programs in terms of economic development needs; increased budgeting for Hispanic participation in Federal job training programs; increased health services, establishment of clinics, and training in the health profession; more low-cost housing; greater emphasis within the Department of Agriculture on assistance to Hispanics; and greater attention to migrant problems.

[79] The chairman was Henry M. Ramirez who was nominated Apr. 3, 1971, and confirmed Nov. 9, 1971. The Cabinet Committee as of July 1974 had a staff of about 35 people. It was established in 1969 and had an uncertain future. It had been funded by continuing resolutions since the beginning of fiscal year 1973. A 90-day resolution was passed on June 28, 1974, and extended through Sept. 30, 1974. As of July 5, 1974, a bill was pending in Congress which would authorize the appropriation of [illegible]1 million for the Cabinet Committee for fiscal year 1975. Telephone interview with E. B. Duarte, Director of Public Affairs, CCOSSP, July 5, 1974. The Nixon administration felt certain this bill would pass. 1974 Slight interview, *supra* note 24. The Cabinet Committee ceased to exist on Dec. 16, 1974. See pt. B, II(B) *infra*.

[80] When Mr. Marumoto (see note 30 *supra*) was responsible for White House activities relating to persons of Spanish origin, his major duties apart from Federal employment opportunities for Hispanics, involved acting as an inhouse advocate for Hispanics and assisting with communications. He wrote speeches and answered requests. For example, whenever an Hispanic group or organization requested a communication from the President, Mr. Marumoto ensured that such a message went out from the White House. Other duties included seeing that invitations were sent to appropriate persons of Spanish origin to attend State dinners or to accompany visitors from Spanish-speaking countries to religious services.

[81] 1973 Slight interview, *supra* note 54.

[82] See response of Cabinet Committee on Opportunities Spanish Speaking People to U.S. Commission on Civil Rights questionnaire, contained in a letter from Henry M. Ramirez, Chairman, CCOSSP, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 25, 1973. CCOSSP had worked in other areas as well. *Id*.

The Cabinet Committee on Opportunities for Spanish Speaking People and the National Council for Indian Opportunity, like several other Cabinet Committees on such subjects as youth and physical fitness, were inherited from President Johnson. The committees served primarily as a buffer between the White House and the constituency of the committees.

[83] 42 U.S.C. §4303 (1970).

[84] 1973 Slight interview, *supra* note 54.

[85] Most members sent a representative. The Administrator of SBA was the only member who attended all meetings; some others attended irregularly. Duarte interview, *supra* note 79. Mr. Duarte said he believed it important for members to attend, rather than a representative, to improve the credibility of the Committee. The staff of Cabinet committees are able to attract the attention of particular Cabinet heads only when matters of vital interest to their agencies are discussed. Cabinet members otherwise respond only to the President.

[86] 42 U.S.C. §4302(e) (1970).

[87] 1973 Slight interview, *supra* note 54.

[88] Only three meetings were held prior to fiscal year 1974, none during fiscal year 1973. Four additional meetings were held during fiscal year 1974, but not on a "quarterly" basis. They were held in July and December 1973 and in May and June 1974. Letter from Henry M. Ramirez, Chairman, CCOSSP, to Don Edwards, Member, House of Representatives, Mar. 21, 1973, and Duarte interview, *supra* note 79.

[89] The minutes are part of a transcript of hearings on equal opportunities for people of Spanish origin. Hearings before the Civil Rights and Constitutional Rights Subcomm. of the Comm. on the Judiciary, U. S. House of Representatives, 93d Cong., 2d Sess., "The Role of the Cabinet Committee on Opportunities for Spanish Speaking People in Providing Equal Opportunities for Spanish Speaking People," at 28–37, July 11 and 19, 1973.

At the first of the three CCOSSP meetings, (Aug. 5, 1971), the President spoke largely about Federal employment, emphasizing that Federal agencies must seek to fill new positions and vacant slots with persons of Spanish origin. The second meeting (Apr. 20, 1972) served to announce Federal agency contributions to programs for persons of Spanish origin at the regional level. The contributions were: Departments of Health, Education, and Welfare—$4.75 million; Labor—$1.99 million; and Housing and Urban Development—$24.2 million; Office of Economic Opportunity—$1.0 million; Environmental Protection Agency—$0.5 million; and the Law Enforcement Assistance Administration—$0.48 million. At the third meeting, July 18, 1973, the staff of the Cabinet Committee made recommendations for the improvement of Federal equal employment opportunity for persons of Spanish origin, the collection of racial and ethnic data, and the development of a national policy concerning migrants. Little commitment was indicated to these recommendations by the attendant Federal agency representatives.

The Cabinet Committee was served by a nine-member advisory council appointed by President Nixon from among individuals who were representatives of Mexican American, Puerto Rican, Cuban, and other Hispanic communities in this country.[91]

In order to make the Cabinet Committee more effective, in August 1973 Counsellor Armstrong reported that she had asked Cabinet members to appoint a high level person to participate in a working group of senior Federal officials.[92] The group's purpose was to assist in preparing the agenda for Cabinet Committee meetings.[93] As of June 1974 this group had met at least four times.[94]

Beyond the Cabinet Committee activities, there were also White House efforts on behalf of persons of Spanish origin. Recruitment for Presidential appointments and "supergrade"[95] positions in Federal agencies had been a continuing task at the White House. In the fall of 1970 there were only 18 supergrades of Spanish origin and by May 1973 this number had increased by 100 percent to 36. However, this figure was far less than 1 percent of all supergrades.[96]

Ms. Armstrong also arranged meetings with mayors in such cities as San Diego, Fort Worth, Houston and Philadelphia to discuss local employment opportunities for persons of Spanish origin. This series of meetings appeared to have stemmed largely from the onset of general revenue sharing, which required nondiscrimination in State and local programs and activities funded by general revenue sharing monies. Ms. Armstrong believed that revenue sharing would be a valuable tool for persons of Spanish origin because it would make city mayors accountable to them.[97]

Especially in light of the poor equal opportunity record of State and local governments, such optimism appears unfounded.[98] Although the regulations implementing the State and Local Fiscal Assistance Act of 1972[99] were designed to encourage public participation in the general revenue sharing process,[100] the public accountability requirements are so unrelated to the actual planning process that they do not, in fact, work to encourage public accountability.[101]

C. Asian and Pacific Americans

The fact that there was no office concerned with Asian American problems[102] had been considered by the White House from time to time along with possible remedies for the problem, such as the establishment of a Cabinet committee for Asian Americans.[103] This concern did not lead to any results. With the exception of a period of time during the 1972 presidential campaign,[104] no one in the White House was given even part-time responsibilities in this area.

In October 1972 the Secretary of Health, Education, and Welfare wrote to the Domestic Council and requested that as an alternative to the development of a Cabinet committee, the Domestic Council conduct a review of the problems of Asian Americans.[105] Although this type of review is essential for determining the scope of activities necessary to assist any group, as of June 1974 the Secretary's memorandum remained unanswered, and no such review was made.[106]

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[90] 42 U.S.C. §4311 (1970) states:

> The Committee shall as soon as possible after the end of each fiscal year, submit a report to the President and the Congress of its activities for the preceeding year, including in such report any recommendations the Committee deems appropriate to accomplish the purpose of this act.

[91] The advisory council met three times during fiscal year 1974: July and September 1973 and January 1974. The meetings were informal, usually lasting 1 day. The council met with the Chairman and other staff members to discuss what the staff were doing and how their activities could be improved.

[92] Interview with Anne Armstrong, Aug. 9, 1973. Ms. Armstrong said she asked each Cabinet member to appoint "someone who can speak for you." She indicated this would not be a group of undersecretaries, but rather senior staff people. *Id.* However, the working group was composed of both special assistants to departmental secretaries and undersecretaries.

[93] 1974 Slight interview, *supra* note 24.

[94] *Id.* Mr. Slight reported that the committee had met prior to the fiscal year 1974 meetings of the Cabinet Committee, but was uncertain whether the Chairman had convened this group on any other occasion.

[95] These are GS 16, 17, and 18 positions, the three top civil service categories, which at that time offered salaries beginning at approximately $32,800; such positions are held by senior policymakers and managers.

[96] U.S. Civil Service Commission, *Minority Group Employment in the Federal Government,* November 1970 and May 1973. Cf. Marumoto interview, *supra* note 30. According to Mr. Marumoto, in fall 1970 there were only six supergrades and presidential appointees of Spanish origin and this was increased to 51 by fall 1972. Thus, it appears that either the Civil Service Commission figures were too low or that the White House figures were inflated.

[97] Armstrong interview, *supra* note 92. This viewpoint was repeated by Fredric Slight who indicated his belief that Hispanic organizations were more likely to get assistance under both general and special revenue sharing because these groups would be dealing with local officials and not "faceless bureaucrats" in Washington. 1974 Slight interview, *supra* note 24.

[98] See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort — 1974, Vol. IV, To Provide Fiscal Assistance* (February 1975).

[99] 31 U.S.C. §§1221-1263 (Supp. V., 1975) and 26 U.S.C. §§6017A and 6687.

[100] For example, the regulations (31 U.S.C. §1241 (Supp. V., 1975)) require that State and local governments periodically publish reports indicating how they plan to use the general revenue sharing funds and how they have actually been spent.

[101] See U.S. Commission on Civil Rights, *Making Civil Rights Sense of Revenue Sharing Dollars* (February 1975).

[102] According to Mr. Marumoto, the problems of Asian Americans which needed to be addressed in terms of policy formulation closely resemble those for persons of Spanish origin, with the addition of a review of the Nation's immigration laws, particularly in terms of the needs of urban immigrant groups, e.g., Chinese and Filipinos. Marumoto interview, *supra* note 30.

[103] *Id.* See for example, Japanese American Citizen's League, A Brief for a Cabinet Committee on Asian American Affairs, Nov. 15, 1971.

[104] The pre-election activities were similar to those conducted by Mr. Marumoto for persons of Spanish origin.

D. Native Americans

Federal Indian policy is based upon a unique relationship between the Native American people and the Federal Government, which has a trust responsibility to insure protection of Indian lands and natural resources. The Federal Government is also specifically responsible for the provision of public services to Native American people.[107]

This relationship, however, has been fraught with difficulties. One of the principal problems has been the Government's conflict of interest in attempting to administer its trust. For example, the Bureau of Indian Affairs (BIA), which functions as a specialized agency to carry out the Government's legal and trust responsibilities to Native American people,[108] is a division of the Department of the Interior (USDI). The Department of the Interior's responsibility, through the BIA, as protector of the rights of Native Americans from encroachment by Federal, State, and private interests conflicts with its own interest in gaining access to the natural resources which are under Native American ownership.[109]

Additionally, the Federal Government's attitude toward Native American people has been described as paternalistic. As a noted Indian spokesman wrote:

> Since 1778 the Federal Government has vacillated from an advocacy role to an adversary role. The philosophies of the government also included a paternalistic attitude where Indians were generally considered incompetent, and the government, through the BIA, had to make all their decisions for them, and a terminating attitude where Federal supervision was to cease and the Indians to be assimilated into white society. These attitudes and roles were tainted with external forces such as: white developers who were hungry for Indian lands and natural resources, uninformed Congressmen who did not take the time to research the 500-odd legislative actions concerning Indians, and Congressmen who had special axes to grind for their constituency.[110]

Early in his first term of office, President Nixon recognized that the Federal Government's conflict of interest and paternalistic attitudes with regard to Native American people were major impediments to full expression of the rights of Native Americans. In a July 1970 message to Congress he described the Government's conflict of interest:

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[105] The Secretary stated that while his Department had not commended favorable action on H.R. 12208, a bill to establish a Cabinet Committee for Asian affairs, he did believe that some broad Federal initiative was in order. He wrote:

> My assessment is that at the present time, the degree of awareness on the level of response throughout the Federal Government to the Asian American situation is limited and in some instances, nonexistent. . . .The Asian American situation will continue to escalate if a coordinated effort is not made to generate a Federal response to the problems of this minority group. Therefore, I strongly recommend that the Domestic Council assume the lead by undertaking in the immediate future, an assessment of the problems faced by the Asian American minorities, in order to determine what types of Federal action should be initiated to alleviate these problems. Memorandum from Elliot S. Richardson, Secretary of Health, Education, and Welfare, to John D. Ehrlichman, Executive Director, Domestic Council, Oct. 4, 1972.

[106] Telephone interview with Toyo Biddle, coordinator for Asian American Affairs, HEW, June 7, 1974.

[107] The legal relationship between the Federal Government and Indian people is discussed extensively in F.S. Cohen, *The Handbook of Federal Indian Law* (1971). This relationship, established largely by the Constitution, is derived from several principal sources, including the treatymaking powers of the President with the advice and consent of the Senate. (U.S. Const., Art. II, §2, cl. 2.) The Federal Government has entered into treaty relations with nearly every tribe or band within the territorial United States. The reciprocal obligations assumed by the Federal Government and by the Indian tribes constitute a chief source of present day law. Another basis for this relationship is the jurisdiction of Congress over the national domain (Art. IV, §3, cl. 2.) By virtue of the Federal Government's control over the public domain, it exercises broad control over the Indians and effectuates many Indian policies to move Indians westward, to contain Indians on reservations, and to divide Indian community ownership into individual land allotments. Another basis is the war powers of Congress (Art. I, §8, cls. 1, 11, 12, 15, 16, 17). These powers underlie much of the Federal power exercised over Indian land and Indians. In addition, the express power of Congress to "regulate commerce with foreign nations, among the several States, and with the Indian tribes" (Art. I, §8, cl. 3) and the express constitutional basis under the commerce clause to raise and appropriate money for "the general welfare" (Art. I, §8, cl. 1) are of major importance in defining the relationship between the Federal Government and Indian people.

[108] The plenary power of the Federal Government in the area of Indian affairs and the legal complexity of the Federal/Indian relationship has resulted in the establishment of special Federal bureaucratic structures. In 1974 these included the BIA; the Indian Health Service of the Department of Health, Education, and Welfare; and the National Council on Indian Opportunity, Office of the Vice President; and Indian desks in Federal Departments such as Labor and Housing and Urban Development.

[109] USDI's jurisdiction includes: administration of 500 million acres of Federal land mineral and water resources, recreation and parks; reclamation of arid land; the management of hydroelectric power systems; and the social and economic development of trust territories.

One method for decreasing the effects of conflict of interest has been reported:

> An important Indian tax case arose in 1971, and the Department of Justice was about to take only the IRS side of the case to the court of appeals. At White House insistence, Justice agreed to supply also the Government's voice as trustee *for* the Indian. A brief was submitted embodying the two positions, and the court decided in favor of the Indian. The White House then took steps to ensure that this procedure would be made applicable to all Indian natural resources cases where the Secretary or the Solicitor of the Department of the Interior invoked it. Bradley H. Patterson, Jr., "The Federal Executive Branch and the First Americans: A Trustee's Right" in U.S. Commission on Civil Rights, *Civil Rights Digest* 51 (Fall 1973).

[110] Statement by Wendall V. George, vice chairman of the National Indian Economic Development Policy Board and member of the Colville Confederated Tribes, before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Indian Affairs, 93rd Cong. 1st Sess. (1973).

> Every trustee has a legal obligation to advance the interest of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal Government has frequently found itself in that position. There is considerable evidence that the Indians are losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists.[111]

He urged that Native American peoples be allowed to determine their own future:

> It is long past time that the Indian policies of the Federal Government began to recognize and build upon the capacities and insights of Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have been telling us. The time has come to break decisively with the past and to create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[112]

In his message, President Nixon transmitted recommendations to Congress for Indian policy which included (1) a rejection of the forced termination policy of the Federal Government;[113] (2) the provision for the right of Indian communities to control and operate Federal programs; (3) the development of an Indian Trust Counsel Authority to assure independent legal representation for Indian land and natural resource rights;[114] and (4) encouragement of then-pending legislation to return Blue Lake, venerated as sacred land, to the Taos Pueblo people.[115] This message was generally supported by the Indian community. Louis Bruce, past Commissioner of the BIA, stated that he had worked with the Federal Government in Indian affairs since the administration of Franklin Roosevelt, and President Nixon's message exemplified the best statement that he had personally seen emerge from the White House.[116] Unfortunately, by August 1974 only one of the proposals had been enacted.[117] This was the Indian Financing Act of 1974.[118] These recommendations were submitted to Congress annually, but each year died in committee.

President Nixon's message was formulated from recommendations submitted by the Native American membership of the National Council on Indian Opportunity (NCIO),[119] an agency reporting to the Vice President, whose staff handled many responsibilities regarding Native Americans, especially those of advocate and ombudsperson.[120] Like the CCOSSP, NCIO, as a committee of cabinet officers, was ineffective. It was not given any funds until November 1969, one and a half years after its creation, when it was given a 5-year authorization of $300,000 annually. NCIO was phased out by June 30, 1974, however, 6 months before its authorization was to be terminated.[121] It was to be replaced by a committee of the Domestic Council.[122]

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[111] Message from President Nixon transmitting recommendations for Indian policy to Congress, July 8, 1970.

[112] *Id*. Paralleling the philosophy of self-determination espoused by President Nixon, the Supreme Court held that Indian preference employment laws are "one of the primary means by which self-government would be fostered." Morton v. Mancari, 417 U.S. 535 (1974). In this case, the Court upheld laws giving qualified Native Americans preference in all aspects of employment in BIA operations.

[113] In 1953 House Concurrent Resolution 108 of the 83rd Congress declared termination as the long-range goal of its Indian policy. H. Con. Res. 108, 67 Stat. B 132 (1953). The implications of termination are loss of trust status under Federal law, discontinuance of tax exempt status of lands, repudiation of Federal responsibility for the economic and social welfare of the tribe, and assimiliation of Native American people into society at large. Nevertheless, the trust status of the previously terminated Menominee Tribe was restored by an act of Congress Dec. 22, 1973, 25 U.S.C. §§903, 903(a) (Supp. V, 1975).

[114] The proposed Counsel would be independent of the Departments of the Interior and Justice and expressly empowered in its trustee capacity to bring suit in the name of the United States. Indian support for the establishment of an independent legal counsel was emphasized in "Trail of Broken Treaties: For Reviews of Contracts-Reconstruction of Indian Communities and Securing an Indian Future in America," a 20-point position paper formulated by Indian authors, tribal leaders, and other Indian individuals. The paper represented a culmination of the efforts of the Caravan Workshop, conducted in St. Paul, Minn., Oct. 23 to 27, 1972. The principal author was Hank Adams, executive director, Survival of American Indians Association. Cited in Indian Legal Information Development Service, *Legislative Review* 57 (November 1972). Institute for the Development of Indian law. See also *Declaration of Continuing Independence*, by the First International Treaty Council, June 16, 1974. The declaration was drafted by 4,000 Indians from 97 different tribes at the Standing Rock Sioux Reservation, Mobridge, S. Dak. It enumerated their plan to explore treaty violations and assert the sovereign rights of the Native people of this continent.

[115] See National Council on Indian Opportunity Report, 1970. The report noted that the Taos Pueblo had been seeking peaceful and legal means for the return of Blue Lake, N. Mex. for more than 60 years. The Indian Claims Commission ruled in 1965 that the lands in question had been seized illegally. The lands were restored by Congress to the Taos Pueblo Tribe through enactment of Public Law 91-550, Dec. 15, 1970. Other proposals of the report were to establish an Assistant Secretary of Indian Affairs in the Department of the Interior, to permit tribal governments to assume control of federally funded programs under USDI and HEW, and recognition of the special situation of urban Indians. Nixon Indian Policy Message, *supra* note 111.

[116] La Donna Harris, former member of the National Council on Indian Opportunity, stated that President Nixon's proposed legislation would have resulted in significant advances for Indian peoples if it had been carried out. Telephone interview with La Donna Harris, president, Americans for Indian Opportunity, July 23, 1974. Telephone interview with Louis Bruce, director, Coalition of Eastern Native Americans, July 24, 1974.

[117] There was controversy over whether the lack of progress was attributable to a "conflict of interest" inherent in the Department of the Interior and Congressional committees that determine the use of land and natural resources or to lack of priority given the legislation by the administration. S. Lyman Taylor, *History of Indian Policy*, U.S. Department of the Interior, Bureau of Indian Affairs, 254 (1963). La Donna Harris attributed this failure to NCIO for not utilizing its strengths to insure enactment of the President's recommendations. Harris interview, *supra* note 116. Louis Bruce noted that failure to enact the proposals was due to limited support from Congress. He also said that NCIO should have more aggressively pursued President Nixon's recommendations. Bruce interview, *supra* note 116.

[118] 25 U.S.C. §1451 *et seq*. (Supp. V, 1975). The act broadens the existing revolving loan funds for economic development projects and encourages private lenders to loan more money to Indian projects.

NCIO staff perceived themselves as a direct link between Native American people and the Cabinet officials of eight departments. However, its full membership met only once, on July 26, 1970, a meeting attended by the Secretary of the Interior[123] and two or three other Cabinet members. Some Cabinet members sent deputies.[124] Following the formal meeting, the Native American members generally met with each other once a month, for 2 or 3 days, and much less frequently, with Cabinet members one at a time.[125] Even at such informal meetings, the Secretaries ordinarily departed after an hour or so and left staff members behind.[126] The meetings thus were viewed by NCIO staff as useful primarily to sensitize Federal members to issues of concern to the Indian members.

Federal agencies on the Council worked together to provide outreach activities to specific Native American groups and tribes, often in response to requests from Native Americans.[127] The Council staff held meetings which were attended by Indian desk representatives of Federal agencies and coordinated their field activities. Ad hoc meetings with Native American tribes, at their request, were held in the Council office with Indian desk representatives in attendance.[128]

In 1974 a Domestic Council Committee on Indian Affairs was proposed to replace NCIO by then Vice President Gerald Ford.[129] It was to deal with formulation of Indian policy on a national level by addressing issues that affect the operations of more than one agency.[130] The White House expected the committee to be formally announced by Kenneth Cole, Executive Director of the Domestic Council, prior to August 1, 1974.[131] Although its official title was to be Committee on Indian Affairs, it was actually to be a subcommittee to the Domestic Council's Natural Resources Committee. Thus, the Federal Government planned once again to create a structure to represent Native Americans which would have conflicting interests.

The committee would have a part-time staff director to coordinate its activities,[132] with members of Cabinet level.[133] There would be no full-time staff positions.[134] The committee would be assisted by Native Americans serving in an advisory capacity only. They would not attend the regular committee meetings, a factor which was alarmingly inconsistent with President Nixon's call for self-determination.

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[119] The former Director of NCIO stated, "the one thing for which NCIO should be remembered would be the President's message. It is the bedrock of anything that has been accomplished in this administration." Interview with Robert Robertson, Director, NCIO, by the Native American Press Association, June 1974, cited in American Indian Press Service, press release, undated.

NCIO was established on Mar. 7, 1968, by Exec. Order No. 11399, 3 C.F.R. 1966-1970 Comp., p. 717, to encourage the full use of Federal programs to benefit the Indian population; encourage interagency coordination and cooperation in carrying out Federal programs; appraise the impact and progress of Federal programs to benefit the Indian population; and make suggestions to improve such programs. *Id.*, §2.

[120] Interview with Barbara Kilberg, consultant, the White House, July 6, 1972.

[121] The administration anticipated that legislation would not extend the life of NCIO beyond November 1974 because of opposition in Congress, opposition by some segments of the Indian community to NCIO, and the crowded legislative calendar in the Indian Affairs committees of Congress. Office of Management and Budget, *Questions and Answers on Federal Government Indian Affairs*, June 5, 1974.

[122] *Id.*

[123] This was Walter J. Hickel.

[124] Kilberg interview, *supra* note 120.

[125] Telephone interview with Dale Wing, Assistant Executive Director, NCIO, June 20, 1974.

[126] Interview with Robert Robertson, Executive Director NCIO, July 2, 1973.

[127] Specific projects included: coordination of a multidepartmental-funded program to operate a pilot education project at the New Mexico Indian pueblos; participation in developing comprehensive job training and employment plan for Alaskan Natives; support for the restoration of land to the Warm Springs Indian Reservation; and development of a Department of Transportation project at the Ft. Berthold Reservation, Idaho.

[128] Statement of the NCIO before the House Subcomm. on Appropriations, House of Representatives, 93rd Cong., Apr. 11, 1973.

[129] Interview with Norman Ross, Assistant Director for Natural Resources, Domestic Council, July 9, 1974. With the proposed reorganization of responsibilities for Native American affairs, the Vice President would cease to have duties in this area.

[130] *Id.* Mr. Ross expected that the committee would advise the President concerning Native American affairs for the State of the Union Message in February 1975.

[131] *Id.*

[132] The staff director was to be Norman Ross, who would continue in his position as Assistant Director of the Natural Resources Committee and director of subcommittees on land usage, national ocean policy, and environmental resources.

[133] The cochairmen were to be the Secretaries of the Interior and HEW, and members would include the Attorney General, the Secretaries of HUD and Labor, the Director of OMB, and the heads of other agencies with significant programs affecting Indians. Its subcommittee members were expected to include the Commissioners of the BIA and the Indian Health Service.

[134] Issues were to be formulated and discussed at the Cabinet level with the requisite research prepared by their respective departments.

The Nixon administration proposed two Indian advisory councils, functionally divided into federally and nonfederally recognized tribes, which would serve as vehicles for discussions with the Indian community.

NCIO expertise was not used to determine the membership of the advisory councils to assist the proposed committee.[135] Moreover, due to the diversity of opinion in the Native American community[136] on this proposal, as of August 1974, the method of selecting membership had not been determined.[137] The Domestic Council reported that it would delay the creation of the consultative groups until Native American groups had agreed upon a method for selecting the advisory members.[138]

The White House undertook a number of other activities from 1971 to 1974 with regard to Native Americans.[139] In 1973 the White House reported that it had requested the Department of the Interior to initiate a study of Native American eligibility for Federal assistance in view of the fact that a number of groups of Native Americans including Eastern tribes, State reservations, and terminated groups were ineligible for assistance from the Bureau of Indian Affairs and the Indian Health Service (IHS) in the Department of Health, Education, and Welfare.[140]

At the behest of the Indian community, a National Indian Policy meeting was held from June 7–11, 1974, at the Office of Management and Budget[141] for 400 representatives of Indian tribes and organizations. A principal purpose of the meeting was to discuss the process by which the White House devises its budget for Indian programs. OMB's Associate Director for Natural Resources, Energy, and Science[142] presented a specially prepared document, "Questions and Answers on Federal Government Indian Affairs," to clarify present and future plans for Native American programs throughout the country.

Another activity involved several resolutions and proposals submitted to the White House in the spring of 1973 by the Chiefs and Headmen of the Teton Sioux.[143] In addition, these Indian leaders brought to the attention of a Government civil rights investigating team approximately 50 allegations of violations of civil rights. According to the White House, only four or five of these complaints "were accompanied by solid enough evidence to warrant probable grand jury action."[144]

The White House required that the Native American complainants provide their own documentation of violations of their rights.[145] This seems an unnecessarily stringent standard. It requires of potential complainants much stricter documentation than is set by the Equal Employment Opportunity Commission, which handles the vast majority of all civil rights complaints filed with the Federal Government.[146] The standard is also likely to discourage complainants. Not every person is aware of the elements necessary to document a valid civil rights complaint. The function of the investigating team should have been to determine whether allegations or other expressions of perceived discrimination had any substantial basis in fact.

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[135] Ross interview, *supra* note 129. The Committee was never brought into existence.

[136] La Donna Harris, president, and George Crossland, legal advisor, Americans for Indian Opportunity (AIO), expressed strong displeasure at the idea of two distinct advisory committees and stated that this would create a divisive polarity in the Indian community. AIO leaders believed that there should be a single advisory committee composed of representatives of both federally and nonfederally recognized tribes. An alternative suggestion they offered was for the Committee to utilize a representative group of Indian leaders to present documented options papers which would serve as guidance on substantive issues. Interview with La Donna Harris and George Crossland July 8, 1974.

[137] Ross interview, *supra* note 129.

[138] The Council had approached Indian leadership for suggestions. Mr. Ross presented plans for the proposed Indian Affairs Committee before the National Indian Policy Meeting. See text accompanying note 141 *infra* .

[139] 1973 White House response, *supra* note 23. Mr. Garment's office participated in a determination of the Government position in a series of court cases involving Indian land and water rights. There was also continued activity of earlier involvement with Native American problems. This included drafting a bill which became the Alaska Native Claims Settlement Act, 43 U.S.C. §1601–1627 (Supp. V. 1975), reviewing the effect of revenue sharing proposals on the Indian reservation population, assisting urban Indians to obtain demonstration grants for providing services to their people, helping Federal agencies develop plans for economic development projects, and aiding in the transfer of control of Indian education programs to Indians. *Id* . See also April 1971 White House response, *supra* note 31, and October 1971 White House response, *supra* note 31. The accomplishments claimed by the White House with regard to Native Americans are chronicled by Bradley H. Patterson, Jr., in "The Federal Executive Branch and the First Americans: A Trustee's Right," *supra* note 109.

[140] 1973 White House response, *supra* note 23. BIA and IHS assistance has been provided by law almost exclusively for members of tribes which have signed treaties with the Federal Government. Eastern tribes, State reservations, and terminated tribes are not generally parties to treaties with the Federal Government. BIA formerly also limited benefits to Native Americans and their families living on reservations in the United States or in certain jurisdictions regulated by the BIA in Alaska and Oklahoma. The Supreme Court has recently held that the Snyder Act of 1921 (25 U.S.C. §13 (1970)), which assigned responsibilities to the BIA, requires the Secretary of the Interior to provide benefits to Native Americans living on or near reservations recognized tribes. Morton v. Ruiz, 415 U.S. 199 (1974). This case, however, did not address the issue of nonfederally recognized Indians, and their entitlement to Federal services remains unclear.

[141] This meeting is described in the American Indian Press Association, news service release; Washington, D. C., July 11, 1974.

[142] This was Frank C. Zarb. Also participating were the Undersecretary of the Department of the Interior, the Commissioner of Indian Affairs, and representatives from the Departments of Labor, the Interior, HEW, HUD, Agriculture, and Commerce.

[143] These Chiefs and Headmen made proposals for such actions as the establishment of an independent treaty commission, the protection of Indian mineral and water rights, and a poll of the Teton Sioux people to ascertain their preference for their form of government. See letter from Leonard Garment to the Traditional Chiefs and Headmen of the Teton Sioux, May 29, 1973.

[144] *Id* .

[145] *Id* . Mr. Garment wrote:

> I urge you. . .to bring any specific complaints you have to the attention of the Civil Rights investigating team; but these complaints must be supported by hard evidence. . .I counsel you, you must have specific, hard evidence rather than merely rumors or allegations.

In addition, the White House staff's active role in Native American affairs frequently occurred to meet a particular crisis or to avoid bloodshed or other violence as Indian problems have come to a head during the past few years. The White House listed among its accomplishments[147] the avoidance of the use of deadly force in the 1972 occupation of the BIA building by the Trail of Broken Treaties Caravan[148] and the minimization of casualities in the confrontation at Wounded Knee in March, April, and May of 1973[149] Indeed, these two activities occupied almost half the time of Messrs. Garment and Patterson in 1973.[150]

E. Women

One issue of concern to women received consideration at the policymaking level: An option paper[151] coordinated by Mr. Garment's office in the late spring of 1974, set forth the issues which would be involved in opening military academies, including West Point and Annapolis, to women.[152] The White House favored the opening of the academies to women. the policy of refusing admission to women clearly placed women at a competitive disadvantage in pursuing a career[153] and contradicted congressional commitment to equal employment and educational opportunity for women.

It would appear that this subject received attention because the discriminatory status quo in academies was threatened by litigation and pending legislation.[154] The subject of discrimination against women in other areas such as federally assisted programs[155] and the sale and rental of housing were not brought by White House staff before President Nixon for his consideration, although such discrimination was at least as serious as exclusion of women from military academies.

The failure of the women's program to conduct systematic policy review was illustrated by its lack of plans to assess the extent of discrimination against women in federally assisted programs.[156] In June 1973, the White House stated that it would not review the need for a prohibition against sex discrimination in these programs, until it had information on the impact of the prohibition against sex discrimination in programs funded by general revenue sharing.[157] Staff of the Office of Revenue Sharing (ORS) in the Department of the Treasury reported, however, that they did not know of any requests made by the White House or ORS to supply it with such information.[158]

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[146] The requirements for contents of a complaint filed with EEOC are published at 29 C.F.R. §1601.11 (1975). In addition to names and addresses of the charging party and respondent, the charging party must submit "a clear and concise statement of the fact. . .constituting the alleged unlawful. . .practice." *Id*. at §1601.11(a)(3).

[147] 1973 White House response, *supra* note 23.

[148] The Trail of Broken Treaties Caravan is discussed in note 114 *supra* .

[149] In early 1973 the civil rights organization on the Pine Ridge Reservation requested the American Indian Movement to join in efforts to impeach the chairman of the Oglala Sioux Tribe. These groups, with the counsel of the traditional tribal elders, decided to occupy Wounded Knee, selected for its spiritual significance because the last massacre of the Sioux people occurred there. The demands basic to the occupation of Wounded Knee included: removal and suspension of the tribal government and its replacement by a traditional form of government with chiefs and the elders of the Teton Sioux as the final decisionmaking authority; revocation of the Indian Reorganization Act of 1934 which provided for the election of tribal officials as a mandatory prerequisite for "federally recognized" status and the legal and moral responsibility of the Federal Government to enforce the 1868 treaty between the Sioux Nation and the United States. Testimony by Russell Means before the United States Senate Subcomm. on Indian Affairs, Hearing on Wounded Knee, conducted at the Pine Ridge Reservation, S. Dak., June 16–17, 1973. See also testimony by Frank Fools Crow and Ramon Roubideaux at that hearing.

[150] Interview with Bradley H. Patterson, Jr., Jan. 28, 1977.

[151] An "option paper" is written by White House staff setting forth as many points of view as possible to enable the President to formulate policy. It would be likely to provide information about the status of any issue throughout the country, for example, the number and status of lawsuits, and it would review the impact of actual or possible court orders and decisions. See 1974 Patterson interview and Mead interview, *supra* notes 18 and 49.

[152] 1974 Patterson interview, *supra* note 18.

[153] Cadets are given free tuition, room, and board while receiving a college education of high quality. Academy graduates have a much better opportunity to achieve positions of authority in the military than women and other persons who do not attend the academies. Moreover, graduation from service academies, and subsequent participation in military life as a ranking officer, has advantages in civilian life. For example, officers frequently retire at an early age with a reasonable pension and qualify for well-paying positions in industry and government.

[154] In September 1973 two similar suits were filed alleging that women nominated for appointment to the military academies were routinely refused consideration. In each case, the plaintiffs were two Members of Congress and one female nomineee who been rejected for appointment to a military service academy. Collectively, the defendants were the Secretaries of Defense, the Secretaries of the Air Force and the Navy, and the superintendents of the two academies. The two suits, which charged that the refusal to consider women for appointments to academies was discrimination unlawful under the Constitution, were consolidated for trial before the U.S. District Court for the District of Columbia. The court without hearing evidence on the matter held that academies had a rationale basis for excluding women and ruled against the plaintiffs. Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C. 1974). An immediate appeal was taken by the plaintiffs to the U.S. Court of Appeals for the District of Columbia Circuit which reversed the district court decision and remanded the case for a full trial on the merits. Waldie v. Schlesinger, 509 F. 2d 508 (D.C. Cir. 1974). The discriminatory tradition was finally overcome by legislation (the Department of Defense Appropriation Authorization Act of 1976, Pub. L. No. 94–106 §803 (Oct. 7, 1975)), which instructed the Secretaries of the Army, Navy, and Air Force to take steps to ensure that women would be eligible for appointment and admission to the military academies. 10 U.S.C. §403, 603, 903 (Supp. V, 1975).

[155] Staff of the U.S. Commission on Civil Rights recommended to the Department of Justice that measures be taken to prohibit Federal grantees from discrimination on the basis of sex in the distribution of Federal assistance. Letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, May 14, 1973. Ms. Keesling stated that subsequent to the Commission staff interview with Ms. Hirschberg, Ms. Hirschberg apparently discussed this issue with Department of Justice officials. Interview with Jeanne M. Holm, Special Assistant to the President for Women, and Karen Keesling, assistant to Ms. Holm, Jan. 10, 1977.

The Office of Women's Programs was the first office in the White House with any responsibility relating to women's rights. That office, however, had little authority or influence,[159] and it had not attempted to identify systematically the issues it would address. Basically its role was to handle public relations, resolve complaints, and assist in recruitment of women for top Federal positions. This was reflected by the three major activities it had undertaken as of mid-summer 1973.

The first of these was to prod Federal agencies to increase their hiring of women in top level positions.[160] Counsellor Armstrong and Civil Service Vice Chairman Jayne Baker Spain[161] had begun to visit Federal agency heads to impress upon them the importance of such an effort. These visits were to be followed by pressure from staff of the Office of Women's Programs upon Federal agency officials.[162] In addition, the office planned to review affirmative action plans submitted to the Civil Service Commission (CSC).[163]

A second major activity of the Women's Program was to monitor the ratification of the Equal Rights Amendment (ERA).[164] President Nixon urged ratification of the ERA in his 1973 State of the Union Message,[165] but the White House staff viewed their ability to support this amendment as limited.[166] They could not solicit support, but could only provide information upon invitation, for example, at hearings on the ERA by State legislatures, at meetings of women's groups, and in television debates.[167] As of the summer of 1973, the White House had no informational literature of its own on the ERA, although a factsheet was in preparation. In response to requests, the White House sent out materials published by other groups.[168]

A third major activity of the Office of Women's Programs was a series of meetings planned with representatives of national women's organizations to discuss issues and problems of concern to American women.[169] Two were held in June 1973,[170] each with representatives of four or five organizations concerned with women's rights, largely member organizations of the Ad Hoc Coalition on Women's Rights.[171]

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[156] The White House had not requested Federal agencies to supply information necessary for a review.

[157] Hirschberg interview, *supra* note 55.

[158] Telephone interviews with Malaku Steen, equal opportunity specialist, Compliance Division, Office of Revenue Sharing, Department of the Treasury, July 23, 1974, and Priscilla Crane, manager, Public Affairs Division, Office of Revenue Sharing, Department of the Treasury, July 23, 1974.

[159] The fact that the women's program even existed was viewed by its director as a big step forward. She stated her hope that the influences of the women's program would grow, perhaps eventually attracting concern for women's rights by the Domestic Council. A fatalistic attitude was reflected by her closing statement, "If I am here for 4 years, I will be very proud if I can say that I have achieved one accomplishment." Hirschberg interview, *supra* note 55.

According to the Director, the Office of Women's Programs was responsible for advising the President concerning pressing women's rights issues. Asked for an example of an issue brought to presidential attention, however, the Director described a complaint which had been relayed to the President. The complaint involved the national organization of the Junior Chambers of Commerce which had revoked the charter of the Rochester, N.Y. chapter because it had adopted bylaws permitting the admission of women. *Id* . As of July 1974, the Philadelphia chapter, which also had its charter revoked over this issue, and the Rochester Chapter had not had their charters restored by the national organization. Telephone interview with Ray Roper, executive vice-president, U.S. Junior Chamber of Commerce, Tulsa, Okla., July 5, 1974.

[160] A list of female appointments in the Nixon administration through fiscal year 1973 is contained in the White House factsheet, "Women Presidential Appointments during the Nixon administration as of June 1973," available from the Office of Women's Programs, the White House.

[161] In April 1971 President Nixon nominated Jayne Baker Spain to be Vice Chairman of the Civil Service Commission. Her nomination was confirmed by the Senate June 8, 1971. She was the first woman to have held that position in 10 years.

[162] Hirschberg interview, *supra* note 55. See also *Washington Star-News*, "Better Jobs for Women Campaign Launched," July 19, 1973, reprinted in EEOC, II *News Digest* , no. 17, July 31, 1973.

[163] Hirschberg interview, *supra* note 55. To monitor progress towards achievement of goals, a reporting system was being organized. See sec. III *infra* .

[164] The ERA was passed by the 92nd Congress by the overwhelming majority of 84 to 8 in the Senate on Oct. 12, 1971, and 354 to 23 in the House on Mar. 22, 1972. When ratified by three-fourths of the States, i.e., 38 States, by March 1979, it will become the 27th amendment to the Constitution. It would insure that men and women have the same rights and responsibilities under law. As of Sept. 1, 1976, 34 States had ratified the amendment.

[165] Message to the Congress on Human Resources (Fourth in a series of 1973 State of the Union Messages), Mar. 1, 1973. See 9 *Weekly Compilation of Presidential Documents* 196, 207 (Mar. 5, 1973). President Nixon reaffirmed his support for the ERA in a proclamation Aug. 16, 1973, issued in recognition of Aug. 26, 1973, as Women's Equality Day. 9 *Weekly Compilation of Presidential Documents* 996 (Aug. 20, 1973).

[166] Hirschberg interview, *supra* note 55.

[167] *Id* . It was largely Consultant Ruckelshaus who, before coming to the White House in January 1973, succeeded in introducing the ERA into the platform of the Republican Party in 1972. Kilberg interview, *supra* note 120.

[168] In the summer of 1973 the White House was receiving about 15 such requests per week. Material sent out in response to these requests included the following pamphlets: Republican National Committee, "Ten Reasons Why the Equal Rights Amendment Should be Ratified" (undated); National Federation of Business and Professional Women's Clubs, Inc., "How and Why to Ratify the Equal Rights Amendments," (undated); and Common Cause, "Equality of Rights. . .Shall Not be Abridged. . .On Account of Sex" (undated).

The White House arranged meetings for the Ad Hoc Coalition with Secretary of Labor Peter J. Brennan and Secretary of Health, Education, and Welfare Caspar W. Weinberger[172] because the Secretaries had not been receptive to the coalition's own request for a meeting. Prior to these meetings, representatives of the Office of Women's Programs[173] met with the Ad Hoc Coalition to discuss the pending sessions with the Secretaries. Nonetheless, the coalition was not prepared to discuss some important issues with the Secretaries. For example, the coalition did not discuss with Secretary Brennan[174] the need to upgrade the status of the Office of Federal Contract Compliance (OFCC)[175] or to reconcile differences between OFCC and Equal Employment Opportunity Commission (EEOC) guidelines.[176] The meeting with Secretary Brennan was regarded by the women's groups as successful,[177] but few, of his promises have come to fruition.[178]

The Office of Women's Programs also participated in planning the agenda and format for a September 1973 symposium[179] sponsored by the Advisory Committee on the Economic Role of Women to the President's Council of Economic Advisors[180]. The symposium, "Advancing Women in Industry," was held September 20, 1973, in Washington, D.C. The speakers were largely women with responsible positions in industry, labor, the media, government, and the academic community, and the topics covered included women in management and career planning for women.[181] Those attending included a large number of businessmen, some businesswomen, union officials, Federal employees, and representatives of women's rights groups.[182]

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[169] Interview with Jill Ruckelshaus, consultant to Counsellor Armstrong, the White House, July 1973. See also the White House, Office of Counsellor Anne Armstrong, press release, June 13, 1973.

[170] The meetings were held on June 13 and 27, 1973.

[171] Member groups of the Ad Hoc Coalition included: Federally Employed Women; the Interstate Association of Commissions on the Status of Women; the National Federation of Business and Professional Women's Clubs; the National Organization for Women; the National Women's Political Caucus; the Project on the Status of Women of the Association of American colleges; and the Women's Equity Action League. Not included in the coalition but attending the June 13 meeting were representatives of the Governor of New York's Women's Rights Unit.

[172] The Ad Hoc Coalition met with Secretary Brennan May 29, 1973, and with Secretary Weinberger June 4, 1973. Additional meetings were planned with then Attorney General Elliot Richardson and then Secretary of Defense James Schlesinger. Kilberg interview, *supra* note 120.

[173] On April 25, 1973, the Ad Hoc Coalition met with Jill Ruckelshaus and Vera Hirschberg.

[174] Among the issues the Coalition discussed with Secretary Brennan were:
—The need to upgrade the Women's Bureau to an operating administration separate from the Employment Standards Administration and the importance of having the Regional Directors of the Women's Bureau report to the Director of the Women's Bureau rather than the Employment Standards Administration.
—The need to inform Federal construction contractors of the prohibition against sex discrimination contained in Executive Order 11246, as amended.

[175] The Office of Federal Contract Compliance is discussed in *The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination* 230 (July 1975) [hereinafter referred to as *To Eliminate Employment Discrimination*] . This office became the Office of Contract Compliance Programs in June 1973.

[176] Differences between OFCCP and EEOC guidelines are discussed in *Id* . at 244–50. At the time of the Ad Hoc Coalition's meeting with Secretary Brennan, several important differences existed between the guidelines on sex discrimination published by OFCC (29 C.F.R. §1604.1 *et seq* .) and EEOC (41 C.F.R. §60–20.1 *et seq.*). For example, OFFCP's guidelines do not forbid mandatory maternity leave policies; EEOC's did. OFCCP's guidelines do not require that pregnancy benefits be the same as for other temporary disabilities; EEOC's guidelines did. In addition, OFCCP's guidelines permitted employers to provide for different retirement benefits for the sexes, so long as contractors' contributions for both groups were equal; EEOC took the position that no difference was permissible in any event.

[177] This contrasts sharply with the representatives' views of the meeting with Secretary of HEW Weinberger. In that meeting, issues such as family planning, child care, and education were discussed. The Secretary's response to most suggestions was that perhaps a study should be done. He made no commitment to take action. Kilberg interview, *supra* note 120. "We got no commitments from Weinberger, but quite a lot in the way of promises from Brennan," reported Joy Simonson, president of the Interstate Association of Commissions on the Status of Women. See *Miami Herald* , "Brennan a Hit With Women Leaders," June 7, 1973, at 5D, cols. 1–5. The group also complained that Secretary Weinberger brought only a few "lower-echelon" aides to the meeting, while Secretary Brennan brought the Solicitor of Labor, the Assistant Secretary for Employment Standards, the Director-designate of the Women's Bureau, the Acting Director of the Office of Federal Contract Compliance, and the Department's Director of Equal Employment Opportunity. *Id* .

[178] Secretary Brennan pledged to focus efforts to expand opportunities for women in occupations not presently open to women, to give women increased opportunities in federally-supported training programs, and to set up a women's advisory committee to the Department of Labor. He promised to change the name of the Manpower Administration to the Humanpower Administration. Kilberg interview, *supra* note 120. In November 1975 the Manpower Administration was changed to the Employment and Training Administration by Secretary of Labor John T. Dunlop.

[179] Hirschberg interview, *supra* note 55.

[180] Herbert Stein was Chairman of the Council. Anne Armstrong was a member of the Advisory Committee.

[181] Council of Economic Advisors, *Proceedings of the Symposium* , "Advancing Women in Industry," Sept. 20, 1973.

[182] At least one women's rights group protested the symposium. The symposium was presented a statement from Wilma Scott Heide, president of the National Organization for Women, Inc. (NOW), who had been invited by Anne Armstrong but did not attend. NOW stated that it was "a gross insult" to invite active feminists "to passively listen to Johnny-come-latelies, noncompliant employer representatives, token women, and men who are intellectually pseudo-feminists." Ms. Heide also noted that none of NOW's recommendations of feminist economists for appointments to the Advisory Committee on the Economic Role of Women had been accepted by Mr. Stein, and questioned the commitment and insights of the President. The statement is reproduced as an appendix to the *Proceedings, supra* note 181. NOW also issued the statement as a press release, Sept. 20, 1973.

According to the Director of Women's Programs, the revision of laws which have a discriminatory impact was a priority for the Women's Program,[183] but the White House had taken no action in this area. It had not asked Federal agency heads to determine which of their enabling laws, implementing rules, or regulations are discriminatory or to take steps to change them.[184]

The Office of Women's Programs would have liked to take positions on child care and the inclusion of domestic workers under the coverage of minimum wage laws, but reported that the Nixon Administration was not receptive to these views.[185] Although the Office of Women's Programs reported to a Presidential counsellor whose responsibility was to provide advice to the President, neither that office nor Counsellor Armstrong proposed positions conflicting with the Nixon administration's policies, even if those policies were contrary to the interest of women.[186]

III. INFORMATION-GATHERING AND MONITORING SYSTEMS

Fundamental to the intelligent exercise of any policymaking function, particularly where a vast number of programs and the claims of large numbers of citizens must compete for the attention of the policymaker, should be a comprehensive information-gathering system. Accurate data expose the successes and failures of existing programs, surface submerged issues, and facilitate the most productive allocation of time, money, and effort.[187]

In the area of civil rights enforcement, the responsibilities of the White House require a systematic, regular input of information regarding the entire spectrum of civil rights activities by the various Federal agencies concerned with nondiscrimination in such areas as employment, housing, education, and federally assisted programs. Nonetheless, in this Nation that feeds on raw data and with a technocracy that produces information in staggering proportions,[188] the flow of refined information to the White House in the area of civil rights enforcement was sharply attenuated by woefully inadequate information systems. Moreover, the White House believed that the ad hoc nature of its information flow was no less effective than a systematic collection of data.[189] In April 1971 the White House stated:

> A "reporting" form is not used but there is a reporting system. Every senior Departmental official handling civil rights matters knows that he [sic] has not only a general responsibility but a specific obligation to inform the White House on significant civil rights activities and problems and to ask for White House advice on civil rights policy questions.[190]

In 1973 the White House reported that although there was still no ongoing system for gathering information, its staff relied upon information they gathered themselves on an informal basis. It stated:

> Many of us are frequent visitors to the offices and staffs of other agencies, meeting and talking in person with agency staff people. We also have some chances to get out of Washington. . .and get first-hand views of civil rights problems as presented by the concerned people themselves.[191]

There was, however, an information system which was not ongoing but could have been mobilized rapidly when there was need to get information Government-wide. It relied upon the "expanded resources" of the Office of Management and Budget.[192] This system was used to prepare a lengthy

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[183] Hirschberg interview, *supra* note 55.

[184] Armstrong interview, *supra* note 92.

[185] Hirschberg interview, *supra* note 55.

[186] Indeed, the Director of Women's Programs stated that the role of the Office of Women's Programs was more to provide information to the public about President Nixon's views than to influence Presidential policy. *Id*. See also Kilberg interview, *supra* note 120. Ms. Keesling disagreed with this representation of the role of the Office of Women's Programs. She commented, for example, that the office had participated in the development of the option paper on women in military academies, discussed *supra* this section. Holm and Keesling interview, *supra* note 155. We note, however, that there is no indication that the Office of Women's Programs proposed this policy paper or that it took a position conflicting with the Nixon administration's policy. The paper was developed under Mr. Garment's coordination to consider what the Nixon administration policy should be.

[187] Perhaps most importantly, statistical information can assist in the cataloguing of civil rights issues, the ordering of the priority in which they must be dealt with, and the establishing and monitoring of numerical goals and timetables for the accomplishment of policy objectives.

[188] In fiscal year 1973 Federal obligations for its principal statistical programs were over $300 million. Statistics were collected in such areas as wages and other income, prices, production, education, income maintenance, welfare, crime, and environment. An overview of the major Federal statistical efforts is presented in the *Budget of the United States Government* Fiscal Year 1975, *Special Analysis F*, "Principal Federal Statistical Programs." (January 1974). The *Special Analysis* does not mention the collection of civil rights statistics.

[189] April 1971 White House response, *supra* note 31.

[190] *Id*.

[191] 1973 White House response, *supra* note 23.

[192] October 1971 White House response, *supra* note 31. The "expanded resources" to which the White House referred was the use of budget examiners and the budget examination process to identify civil rights issues and evaluate Federal agency civil rights performance. See memorandum from George Shultz, Director, OMB, to OMB staff, "OMB Civil Rights Activities," Mar. 25, 1971.

White House reply[193] to more than 60 recommendations submitted by the Congressional Black Caucus in March 1971 and to coordinate and review a multiagency response to a questionnaire from this Commission, also in the spring of 1971.[194] It was not used again until mid-1974 when the Nixon administration was preparing for a meeting with Native American leaders.[195] It is significant that the only three occasions for its use were to prepare responses to the questions of outsiders and not to supply internal information needs. Indeed, OMB has vast resources and could have been well utilized in a White House information system.[196] The budget process and management by objective system could have been used in tandem to gather information on the status of Federal agency civil rights programs and to set goals for improvement where deficiencies were revealed.[197] Both of these should have been mobilized on a continuing basis for the purpose of bringing sufficient information before the White House to enable it to exert strong leadership in civil rights enforcement. As of August 1974, however, there was no such systematization of White House civil rights review.

At least two rudimentary information systems have also existed in the White House Office which did not fill the need for comprehensive information gathering. William H. Marumoto gathered program progress reports on implementation of the 16-point program[198] for increased Federal employment of persons of Spanish origin and collected data on Federal grant and contract awards to Hispanic communities and organizations.[199] The reports were submitted irregularly and were narrative in form. Stanley S. Scott sent a form request to Federal departments and agencies for monthly reports on the status of programs affecting the minority community, including the agencies' internal equal opportunity programs. He suggested no standardized format for these reports.[200]

In the White House Women's Program a scanty reporting system was being developed to measure progress in attracting women to high level positions in the Federal Government.[201] In the summer of 1973 the White House needed data on the number of Federal employees by grade level and sex. The Civil Service Commission collects such information on an annual basis,[202] but its publication of the data is generally delayed by a year or more. Accordingly, a request for information on employment by sex went from the White House to Federal departments and agencies. Counsellor Armstrong's office failed, however, to request that the information be cross-tabulated by race, repeating the greatest deficiency of Civil Service Commission data.[203] There was no way to determine the extent to which minority women were adequately represented among women in Federal employment, and it was therefore entirely possible that the Office of Women's Programs would support a recruiting program with no intelligent regard to race or ethnicity.

IV. THE DOMESTIC COUNCIL

The Domestic Council was created on July 1, 1970, by the same reorganization plan which created the Office of Management and Budget.[204] Its purpose as set forth in the reorganization plan is to coordinate formulation of domestic policy.[205] The Domestic

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[193] Letter from Richard M. Nixon, President, to Charles C. Diggs, Chairman, Congressional Black Caucus, and Member, U.S. House of Representatives, Mar. 18, 1971.

[194] October 1971 White House response, *supra* note 31.

[195] The information collected was assembled in Office of Management and Budget, *Questions and Answers on Federal Government Indian Affairs*, June 5, 1974.

[196] For a detailed discussion of OMB's implementation of its civil rights role, see ch. 2 *infra*.

[197] The Commission has long recommended that OMB systematize its use of the budget process to gather information on and review the status of civil rights issues. See for example, *Enforcement Effort* report, *supra* note 22, at 20. Moreover, the management by objective approach of OMB, in which Federal agencies are required to set long-range goals for their performance, could have been used in conjunction with the budget process. In 1973, the Commission recommended:

> . . .OMB should require. . .that each agency review its civil rights jurisdiction, giving close attention to the relationship between civil rights enforcement and its assistance programs. Each agency should be required to set long-range goals for civil rights enforcement. Examiners should assess the adequacy of agency objectives and make certain that agencies have instituted effective mechanisms for accomplishing their goals. They should regularly review enforcement programs to see if agencies are obtaining the desired results. *Reassessment* report, *supra* note 13, at 20.

[198] This was a program for assuring that the needs of persons of Spanish origin were met with respect to Federal employment. It was renamed the "Spanish-Speaking Program" and guidelines are set forth in Civil Service Commission FPM 713-23, Apr. 5, 1974.

[199] Marumoto interview, *supra* note 30.

[200] Memorandum from Stanley Scott to Federal agency heads, untitled and undated, sent to Federal agencies in early 1973, shortly after Mr. Scott's appointment to the position of Special Assistant to President Nixon.

[201] Hirschberg interview, *supra* note 55.

[202] U.S. Civil Service Commission, *Federal Civilian Employment: Women 1972*. The data in this report, from October 1972, were the most recent available from the Civil Service Commission as of June 1974.

[203] *To Eliminate Employment Discrimination*, ch. 1, *supra* note 175.

[204] The responsibilities and performance of the Office of Management and Budget are discussed in ch. 2, *infra*.

[205] President Nixon's statement of Mar. 12, 1970, to the Congress to accompany Reorganization Plan No. 2. The plan and statement are set out as a note following 31 U.S.C. §16 (Supp. 1971). Among specific policy functions in which the Domestic Council is designated to take the lead are: Assessing national needs, collecting information, and developing forecasts for the purpose of defining national goals and objectives.

Council was to concern itself with what the Federal Government should do, and OMB, with how it is carried out.[206]

The Domestic Council is composed of the President, Vice President, Attorney General, and Secretaries of the domestic departments[207] and such other offices of the executive branch as the President may from time to time direct.[208] The Domestic Council had a staff which ranged from about 50 members in fiscal year 1970 to almost 80 in 1972.[209] The staff was headed by an executive director who also functioned as an assistant to the President.[210] As of summer 1973, there were four associate directors with responsibilities for such matters as community development and human resources. Two of the associate directors had civil rights responsibilities.[211]

The Domestic Council was the prime forum for issue review. A staff member has said that the Domestic Council served as a White House "window on the world."[212] Council staff tried to bring as many points of view as possible to bear on an issue in order to aid the President to make a fully informed decision. A function of the Domestic Council was "to take an emotional issue and deal with it in a businesslike and rational way."[213]

Most of the Council's work was done either by individual staff members or through a number of committees.[214] The Council itself met only three or four times a year.[215] Tasks for the Domestic Council were assigned by the President after consultation with senior advisors. Once a domestic policy issue was framed, a committee was often established. The committees functioned at the Cabinet level and consisted of the heads of those agencies most directly interested in the issue.[216] Working groups or task forces, members of which were drawn from the assistant secretary level of the executive departments, were often assigned to assist the committees. Other members of the task force were representatives from the Domestic Council staff and, generally, OMB.

Clearly the creation of such a structure within the Executive office for policy development and review presented a great potential for increased and systematic White House involvement in the Federal civil rights enforcement effort. The establishment of a committee on civil rights enforcement[217] would have been the first step toward providing overall coordination of Federal agency efforts which is necessary in this area.[218] The White House announced the establishment of such a committee in April 1971.[219]

The committee was created by changing the mission of a Domestic Council committee on education, which had been primarily concerned with school desegregation. The committee on education, in turn, had been created in late 1970 from the former Cabinet Committee of Education.[220] At the time of its creation, however, it was assigned no specific

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Identifying alternative ways of observing these objectives and recommending consistent, integrated policy.

Providing rapid response to Presidential needs for policy advice on pressing domestic issues.

Coordinating the establishment of national priorities for the allocation of available resources.

Maintaining a continuous review of the conduct of ongoing programs from a policy standpoint and proposing reforms as needed.

[206] *Id*.

[207] *Id*. These are the Departments of Agriculture, Commerce, HEW, HUD, Interior, Labor, Transportation, and Treasury.

[208] *Id*. Other members have been the Chairman of the Council of Economic Advisors, the Director and Deputy Director of OMB, a counsellor to the President, the Administrator of Veterans Affairs, the Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, and the Executive Director of the Domestic Council.

[209] Its budget had increased from $1.2 million in fiscal year 1971 to almost $1.6 million in 1973. As of 1973 the staff size was 75. See exhibit 1.1 *supra*.

[210] As of August 1974, this position was held by Kenneth R. Cole.

[211] See sec. I *supra* for a discussion of the White House civil rights staff.

[212] Mead interview, *supra* note 49.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] Examples of such committees abound. See 3 *National Journal Reports* 1973 (Sept. 16, 1971) for information on a Domestic Council committee on welfare reform, the members of which included representatives from the Departments of Health, Education, and Welfare; Labor; and Agriculture; General Services Administration; and Office of Management and Budget. In a radio address of Feb. 23, 1974, President Nixon announced the formation of a "top priority Domestic Council Committee on the Rights of Privacy," which would "not just be another research group," but would be "primed for high-level action" on issues of collection, storage, and use of personal data. The Vice President was to chair the Committee; other members were the Secretaries of the Treasury, Defense, Commerce, Labor, and Health, Education and Welfare; the Chairman of the Civil Service Commission; the Director of OMB; the Director of the Office of Consumer Affairs; and the Director of the Office of Telecommunications Policy. 10 *Weekly Compilation of Presidential Documents* 245 (Feb. 25, 1974). On Mar. 31, 1974, for another example, President Nixon announced the establishment of a new Domestic Council committee on veterans' services, to be headed by the Administrator of Veterans Affairs. 10 *Weekly Compilation of Presidential Documents* 378 (Apr. 8, 1974).

[217] In September 1970 this Commission recommended to the White House the creation of such a subcommittee. See *Enforcement Effort* report, *supra* note 22, at 338.

[218] Past Presidents have tried in various ways to create and locate in the White House, free from the existing Federal bureaucracy, a formal mechanism for the coordination of civil rights issue review and policy development. These mechanisms, such as President Kennedy's subcabinet group on civil rights and President Johnson's council on equal opportunity, were reviewed in *Enforcement Effort* report, *supra* note 22, at 332-34.

[219] April 1971 White House response, *supra* note 31.

[220] The Cabinet Committee on Education, established in late 1970, was chaired by Vice President Agnew. When it was made the Domestic Council Committee on Education, the chairman was George P. Shultz, OMB Director, who had been Vice Chairman of the Cabinet committee. Other members of the Cabinet committee who became members of the Council committee were Robert H. Finch and Donald Rumsfeld, Counsellors to the President; John N. Mitchell, Attorney General; Winton M. Blount, Postmaster General; Elliot Richardson, Secretary of Health, Education, and Welfare; and George Romney, Secretary of Housing and Urban Development. The following were added when the education committee became the

duties. This Commission, which had recommended the creation of a Domestic Council Committee on Civil Rights,[221] commented:

> The duties of the Committee, however, have not yet been determined and, thus, it is not certain that the Committee will be assigned the function of developing a comprehensive and systematic civil rights program, an effort which has not been undertaken by the White House to date.[222]

The high promise which the Committee augured was not fulfilled. The Committee never began to operate in an effective manner.[223] It met on no more than three or four occasions.[224] That these meetings occurred at all was perhaps largely due to the personal interest which the Committee Chairman, George P. Shultz, took in its activities.[225] The Committee had definitely ceased to function by the time Mr. Shultz left to become Secretary of the Treasury in 1973.[226] Eventually, the White House stated, it was superseded "by informal consultations among White House staff members, Cabinet heads, OMB and the Domestic Council, and departmental and agency heads,"[227] and by the Equal Employment Opportunity Coordinating Council (EEOCC).[228]

Informal consultations had always existed. For example, in 1971 Mr. Garment indicated that he and other members of his staff were in continuous contact with such agencies as this Commission, the Civil Service Commission, and the Civil Rights Division of the Department of Justice. In addition, ad hoc contacts included consultations with the Department of Health, Education, and Welfare concerning funding for the Nation's black colleges and progress on a program for Cuban refugees and advice offered the General Services Administration about the Federal response to Native American demonstrations on the Island of Alcatraz in California. Such informal consultations did not prove to be a replacement for the Committee.

The Equal Employment Opportunity Coordinating Council could not be considered a viable replacement for the Civil Rights Committee. Plainly the purview of the EEOCC, as its name demonstrates, did not extend beyond employment discrimination, although employment discrimination was not the only serious civil rights problem facing America. Additionally, by July 1974 the EEOCC had not been concerned with the full scope of employment issues, but had limited its focus to developing guidelines to ensure that employment selection and testing criteria

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Civil Rights Committee: James Hodgson, Secretary of Labor; Maurice H. Stans, Secretary of Commerce; John Ehrlichman, Assistant to the President for Domestic Affairs; and Leonard Garment, Special Consultant to the President. April 1971 White House response, *supra* note 31.

[221] *Enforcement Effort* report, *supra* note 22, at 338.

[222] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—Seven Months Later* 75 (1971). Leonard Garment had earlier stated that "The functions of the Committee would be determined by Presidential assignment. . .as is the practice with all committees of the Domestic Council." April 1971 White House response, *supra* note 31.

[223] See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort: One Year Later* 217 (1971). The Commission also observed that while the Committee had endorsed the concept of numerical goals and timetables for equal employment opportunity in the Federal Government, it had not begun to grapple with such fundamental needs as the development of a system of quantifiable goals and timetables for the entire civil rights enforcement effort, nor had it undertaken a systematic review of existing departmental policy decisions affecting civil rights enforcement. The Commission further found that no systematic or comprehensive effort was being made by the White House staff to review the successes and failures of Federal civil rights enforcement activities, and that, although the White House considered OMB responsible for the establishment of mechanisms and procedures necessary to implement goals and policies, the Committee made no effort to determine the extent or manner in which OMB was carrying out this function. *Id.* at 212-16.

[224] 1973 Patterson interview, *supra* note 47. In October 1971 Mr. Shultz indicated that the full committee would meet only when major "cross-cutting policy issues" existed, but at a minimum, quarterly. Specific subgroups would meet more frequently on matters affecting only one or two agencies. He cited fair housing and school desegregation as subjects discussed by these subgroups at "numerous meetings." In addition, there were "several meetings of the full Committee."

Attendance at those meetings was determined by the proposed agenda items. For example, at one meeting the following persons attended in addition to the regular members: Administrator, Small Business Administration; Administrator, General Services Administration; Chairman, Civil Service Commission; Chairman, Equal Employment Opportunity Commission; and Assistant Secretary (management), Department of Defense. Response to U.S. Commission on Civil Rights questionnaire, contained in a letter from George P. Shultz, Director, Office of Management and Budget, to Theodore M. Hesburgh, Chairman, U. S. Commission on Civil Rights, Oct. 19, 1971 [hereinafter referred to as October 1971 OMB response].

[225] The principal agenda item at a meeting Oct. 7, 1971, was a "discussion of the problem-area brought to light during the preparation of responses to your Commission's September 1971 questionnaire." October 1971 OMB response, *supra* note 224. In May 1972, a member of OMB Civil Rights Unit, who had served as staff to the Civil Rights Committee, indicated that another issue taken up by the Council was that of goals and timetables. Interview with James B. Robinson, budget examiner, OMB, May 27, 1972.

[226] 1974 Patterson interview, *supra* note 18.

[227] 1973 White House response, *supra* note 23.

[228] *Id.* and 1974 Patterson interview, *supra* note 18. The EEOCC was established by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-14c (Supp. V, 1975), and given responsibility for:

> . . .developing and implementing agreements, policies, practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdiction of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. *Id.*

Members of EEOCC are the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the Civil Service Commission, and the Chairman of the U.S. Commission on Civil Rights (or their delegates).

were not discriminatory.[229] Moreover, the EEOCC was not brought into the formulation of one of the most significant employment policies of the Nixon administration—the endorsement and definition of the concept of goals and timetables as they apply to public employment.[230] Thus, in no sense could the EEOCC be regarded as fully replacing the Civil Rights Committee as a formal organization.[231]

V. POLICIES AND ACHIEVEMENTS

President Nixon's administration frequently chronicled for the public its accomplishments regarding civil rights.[232] It reported marked progress in such areas as budget expenditures for civil rights, employment of minorities and women, school desegregation, fair housing, and minority business opportunities. While it is clear that there were some advances the cause and extent of that progress is debatable. This section examines in detail administration activities in several important areas.[233]

A. Budget for Civil Rights

Federal agencies were repeatedly admonished by OMB that their budgets should reflect the President's concern for civil rights.[234] One of the actions, which it frequently cited as a major civil rights accomplishment, was the increase in Federal agency budgets for civil rights.

As shown in exhibit 1.2, estimated outlays for civil rights in fiscal year 1975 were $3.5 billion an increase of almost $2 billion, or more than 125 percent from fiscal year 1971. Actual civil rights outlays for fiscal year 1973 were $2.6 billion. Exhibit 1.2 shows that in fiscal year 1975 close to 50 percent of these funds were allocated for Indian programs, including the budgets for the Bureau of Indian Affairs at the Department of the Interior, the National Council on Indian Opportunity, and the Indian Health Service at the Department of Health, Education, and Welfare.[235] About one-third of all civil rights expenditures in 1975 were earmarked for minority business enterprise.[236] Under 20 percent of the funds allocated for civil rights were to be spent on enforcement efforts.[237]

Nonetheless, expenditures for civil rights enforcement have increased. As shown in exhibit 1.2, in fiscal year 1971 Federal agencies' outlays for civil rights enforcement were under $200 million. In fiscal year 1973 they had increased 65 percent, to $313 million with an estimate of over $600 million to be spent in fiscal year 1975.

While the fiscal year 1975 budget represented a great increase in commitment to civil rights expenditures, frequently, the projected increases were not realized. For example, in the fiscal year 1973 budget, the administration estimated that the $600 million

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[229] In early fall 1973 the Council circulated a draft of a uniform agreement on employment selection/testing procedures. As of July 1974, guidelines on testing procedures still had not been agreed upon, and, in general, Council activities had been minimal. The EEOCC is discussed in detail in *To Eliminate Employment Discrimination* , *supra* note 175, ch. VI, the Equal Employment Opportunity Coordinating Council.

[230] See sec. V(B) *infra* . This policy was drafted by Leonard Garment, Special Consultant to the President. The EEOCC was not brought into the policy formulation because its members had different positions on the issue of goals and timetables. Four member agencies signed the policy after it was drafted, but this Commission, the fifth member of the EEOCC, was not a party to the agreement. 1973 Patterson interview, *supra* note 47.

[231] Moreover, the records and papers of the Civil Rights Committee were never turned over to the EEOCC to ensure that the Committee's work would be continued. In fact, EEOCC members were not aware that the EEOCC was supposed to assume any functions of the Domestic Council's Civil Rights Committee. Interviews with Alvin Golub, Deputy Executive Director, Equal Employment Opportunity Commission, June 20, 1974; Irving Kator, Assistant Executive Director, Civil Service Commission, June 24, 1974; David Rose, Chief, Employment Section, Department of Justice, June 5, 1974; and George Travers, Associate Director, Plans, Policies, and Programs, Office of Federal Contract Compliance, Department of Labor, June 17, 1974.

[232] For an articulate statement of the Nixon administration's enforcement of civil rights, see J. Stanley Pottinger, "How the Civil Rights Movement Got Buried By Progress," *The Barrister* (a publication of the Young Lawyers' Section of the American Bar Association) 20 (June 1974). Mr. Pottinger is Assistant Attorney General, Civil Rights Division, Department of Justice. See also statement by Pottinger, "The Tenth Anniversary of the Civil Rights Act of 1964," released by the Department of Justice (July 1, 1974) and *The Budget of the United States Government, Special Analyses on Civil Rights* 1973, 1974, and 1975. For summaries of accomplishments with emphasis on blacks, see White House factsheet, "Highlights of Nixon Administration Initiatives in Civil Rights and Related Social Programs," March 1973 letter from Leonard Garment, Special Consultant to the President, to Vernon E. Jordan, Jr., executive director, National Urban League, Oct. 24, 1974, in response to a Sept. 13, 1972, "Open Letter to the Candidates." In July 1974 the administration's statement of accomplishments with regard to persons of Spanish origin was scheduled to be published in the Cabinet Committee on Opportunities for Spanish Speaking People *Annual Report, Fiscal Year 1973* . However, this report was not found in the Government Printing Office list of publications in September 1976 and appears not to have been published. With regard to Native Americans, see *supra* note 139; and with regard to women, see White House factsheet, "Women in the Federal Government," (undated), available from the Office of Women's Programs, the White House.

[233] For a critical analysis of the Nixon administration's civil rights activities, see Clarence Mitchell (Director, Washington Bureau of the National Association for the Advancement of Colored People), "Mood and Changes: The Civil Rights Record of the Nixon Administration," 49 *Notre Dame Lawyer* 63 (1973).

[234] See, for example, Transmittal Memorandum No. 38 to Circular No. A-11, revised, to Heads of Executive Departments and Establishments, "Preparation and Submission of Annual Budget Estimates," June 21, 1971, which stated:

> Agencies will assure that their estimates reflect full consideration of the administration's goals and responsibilities in the civil rights area. OMB, in its examination of agency submissions, will review plans and estimates for effective implementation of the administration's civil rights policies.

[235] This percentage was decreasing—from 58 percent in 1971 to 49 percent in 1973—and was expected to be 45 percent in 1975.

[236] Federal expenditures for minority business enterprise are discussed in detail in sec. V(E) *infra* .

[237] In 1971 this was about 12 percent and was expected to increase to 17 percent in 1975.

Exhibit 1.2

Federal Civil Rights Enforcement Outlays by Program Category (in millions of dollars)

FISCAL YEAR	Actual			Estimated	
	1971	1972	1973	1974	1975
Civil rights enforcement:					
Federal service equal employment opportunities	27.80	55.50	95.89	117.60	125.01
Military services equal opportunities	5.95	26.16	32.51	48.19	50.81
Private sector equal employment opportunity	34.43	46.67	58.63	77.66	94.00
Equal educational opportunity	70.30	96.43	61.97	211.09	258.84
Fair housing	7.55	11.83	12.63	14.51	16.75
Enforcement and investigation	34.15	43.71	36.72	39.21	43.50
Program direction, research and information dissemination	4.96	6.17	7.38	8.95	10.16
Indian programs	.40	.75	.71	1.09	1.17
Civil rights conciliation and prevention of disputes	4.20	5.51	6.64	4.08	3.60
Civil rights enforcement	189.74	292.73	313.08	522.38	603.84
Minority assistance programs:					
Minority business enterprise	459.09	692.32	941.54	1,179.96	1,201.52
Indian programs	909.00	1,102.25	1,285.00	1,581.00	1,605.00
Minority higher educational assistance	18.90	24.33	66.22	98.60	120.16
Total minority assistance programs	1,386.99	1,818.91	2,292.76	2,859.56	2,926.68
Total civil rights outlays:	**1,576.73**	**2,111.64**	**2,605.84**	**3,381.94**	**3,530.52**

level of expenditures for civil rights enforcement would be reached in that year.[238] It was not.[239] This was largely because the Nixon administration anticipated it would expend $400 million in equal educational opportunities alone that year,[240] but due to Congressional delay less than $62 million was spent.[241]

Moreover, the increase in outlays for civil rights enforcement from 1971 to 1973 was not across-the-board. As shown in exhibit 1.2, the increase was primarily for Federal and private equal employment opportunities and equal opportunity in the military. These expenditures had increased dramatically from over $67 million in 1971 to $187 million in 1973.[242] On the other hand, expenditures for Title VI, listed under "enforcement and investigation" in exhibit 1.2, had been relatively constant and expenditures for equal educational opportunities had decreased.

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[238] *Budget of the United States Government, Fiscal Year 1973, Special Analysis N* 210 (January 1972). Unless otherwise indicated, data in this section are taken from the Special Analyses of 1973 and 1974.

[239] As shown in exhibit 1.2, it was $313 million.

[240] Fiscal year 1973 Budget, *Special Analysis N, supra* note 238.

[241] See exhibit 1.2. This was due to delay in the passage of the Emergency School Aid Act, 20 U.S.C. §§1601–19 (Supp. V, 1975). The act was passed on June 23, 1972, and funds authorized were being spent in fiscal years 1974 and 1975. An additional congressional budget allocation of $1 billion was anticipated to extend this assistance beyond 1975. Telephone interview with James B. Robinson, Civil Rights Budget Examiner, OMB, July 8, 1974.

[242] The largest increase in terms of dollars, from $27.8 million to $95.8 million during the fiscal period 1971–1973, was in the area of ensuring equal opportunity in Federal employment. It should be noted, however, that this increase did not simply represent a decision by the Nixon administration to increase its efforts to deal with discrimination and underutilization in the Federal service. Rather, a significant percentage of the increase was derived from the fact that the Equal Employment Opportunity Act of 1972 assigned specific duties to the Civil Service Commission, and staff had to be devoted to implementing this new congressional mandate.

While the percentage increase in expenditures for fair housing was large (67 percent), the dollar increase was small; by 1973 expenditures for fair housing had increased to only $12 million from the $7 million expended in 1971. Although pervasive housing discrimination continues to elude Federal enforcement,[243] the projected fair housing budget for fiscal year 1975 was only $16 million, a small increase in comparison to housing problems facing the Nation.[244] Furthermore, under 30 percent of this money, $4.7 million, was allocated for HUD's efforts under Title VIII of the Civil Rights Act of 1968.[245] This was less than the $4.9 million spent by the Department of Defense to ensure the right of military personnel to off-base housing. An additional $2.2 million was to be spent by the Department of Justice for developing, negotiating, and litigating Title VIII cases.[246]

It should be noted, too, that inflation accounts for some budget increases. From June 1973 to June 1974, for example, there was an 11.1 percent increase in consumer prices.[247]

Moreover, a significant portion of the expenditures for civil rights enforcement falls under the category of personnel compensation.[248] Thus, as with the entire budget, some of the increases in fiscal year 1973 were due to Federal pay raises.[249] In addition, due to the creation of the Federal Buildings Fund, effective July 1, 1972, Federal agencies were required to pay rent for the buildings they occupy.[250] This has had a marked effect on the budget of some agencies.

For example, the Equal Employment Opportunity Commission (EEOC) budget for fiscal years 1974 and 1975 represents a striking, albeit somewhat extreme, illustration of how a large Federal agency budget increase could result in little increase in agency activity because of increasing costs for such items as rent and personnel. In fiscal year 1974 the congressional appropriation for the Equal Employment Opportunity Commission was $44.4 million. The *Budget* showed that $56.17 million was requested for EEOC's 1975 budget.[251] Although this was an increase of $11.7 million, almost one third of this sum was used to offset the raise in rent costs, from $.3 million in 1974 to $4.1 million in fiscal year 1975.[252] Although EEOC's work was largely carried out by its own staff,[253] the increased fiscal year 1975 budget provided for only 33 new positions.[254]

B. Affirmative Action

Goals and timetables are the cornerstones of affirmative action. They are essential to remedy the effects of past discrimination and ensure against future inequities.[255] In August 1972 they were somewhat reluctantly endorsed by President Nixon. At the same time, he clearly and unequivocally denounced the use of quotas. He wrote:

> I agree that numerical goals, although an important and useful tool to measure progress which remedies the effect of past discrimination, must not be allowed to be applied in such a fashion as to, in fact, result in the imposition of quotas, nor should they be predicated upon or directed towards a concept of proportional representation.[256]

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[243] For a further discussion of these housing discrimination problems, see U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. II, To Provide. . .For Fair Housing* ch. 1 (December 1974)[hereinafter referred to as *To Provide. . .For Fair Housing*].

[244] Indices in racial segregation of 109 cities did not show a marked decrease in the amount of residential segregation from 1940 to 1970. Institute of Research on Property, University of Wisconsin, *Indices of Racial Residential Segregation for 109 Cities in the United States, 1940 to 1970* (February 1974).

[245] 42 U.S.C. §3601 (Supp. V, 1975).

[246] The remaining $5 million was spent by such agencies as the General Services Administration and the Federal financial regulatory agencies.

[247] Consumer prices increased 5.9 percent from June 1972 to June 1973, 2.9 percent from June 1971 to June 1972, and 4.5 percent from June 1970 to 1971. Computed from Bureau of Labor Statistics (Department of Labor) *Consumer Price Indices*. Telephone interview with Catherine Furlong, statistician, Council of Economic Advisors, July 24, 1974.

[248] Almost 15 percent of the Federal budget was used for civilian personnel compensation. The percentage of Federal civil rights expenditures designated for personnel compensation had not been calculated. 1974 Robinson interview, *supra* note 241. Since most civil rights activity was conducted by Federal agency staff, rather than by grant or contract, the percentage of dollars spent on personnel compensation was much higher than for the Government as a whole.

[249] Expenses for Federal salaries increased 5.90 percent in January 1971, 5.50 percent in January 1972, 5.14 percent in October 1972, and 4.80 percent in October 1973. Telephone interview with Jerry Julius, operations research analyst, Budget Review Division, OMB, July 9, 1974.

[250] The fund was established by the Public Buildings Amendments of 1972. The rents are paid to GSA which has set up a revolving fund to cover its expenditures for financing and managing Federal buildings. Previously, GSA was not reimbursed by Federal agencies for these expenditures.

[251] Telephone interview with Clarice Bryce, financial manager (and former budget director), EEOC, July 8, 1974.

[252] *Id.*

[253] In fiscal year 1973, 62 percent of EEOC's budget was spent on personnel compensation alone. *Budget of the United States Government, Appendix*, Fiscal Year 1975.

[254] In fiscal year 1974, EEOC had 2,388 positions. Its fiscal year 1975 budget requested only 2,421 positions. Telephone interview with Clarice Bryce, financial manager, EEOC, July 19, 1974.

[255] This Commission's endorsement of goals and timetables is outlined in U.S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* (1973). The Commission stated:

> To the extent. . .that a problem exists with regard to the utilization of minority groups and women by the employer, then the matter must be treated in the same manner as other management questions. Goals, which are reasonably attainable by applying good faith efforts, should be established to overcome the underutilization. *Id.* at 16.

[256] Letter from President Richard M. Nixon to Philip E. Hoffman, president, American Jewish Committee, Aug. 11, 1972.

This statement caused considerable confusion among Federal agencies. He provided no rationale for his pronouncements, nor did he define what was meant by "goal" or "quota." In fact, it was not until March 1973 that the Nixon administration provided definitions of these terms. The White House issued a policy statement on equal employment opportunity to make clear that goals are an appropriate remedy for past discrimination and that they are distinct from quotas, which historically had been used to discriminate. A goal was defined as: "a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market assuming affirmative recruitment efforts."[257]

The policy placed emphasis on providing words of caution to those employers who might wish to adopt goals and timetables as correctional measures. For example, the policy stated:

> *An employer is not* expected to displace existing employees or hire unneeded or unqualified applicants to meet a goal. If the employer has demonstrated a good faith effort in advertising and recruiting eligibles under an affirmative action program, but still cannot find enough qualified applicants to meet his goal, *he is not* subject to sanction. Under a system of goals, therefore, *an employer is not* required to hire a person who does not have qualifications needed to perform the job successfully. . . .[258] [Emphasis added.]

The statement also contained a lengthy definition of what is meant by a quota:

> In the employment context, a quota would mean the application of a fixed number or percentage of persons of a certain group that would have to be hired; the crucial consideration would be whether the mandatory numbers of persons had in fact been hired or promoted. The fixed number would have been derived from the population in the area or some other numerical base, regardless of the numbers of vacancies or the number of potential applicants who would meet necessary qualifications. If the employer failed to meet the fixed requirement, he would be subject to sanction. . . .[259]

Basically the policy statement focused heavily upon what was not required and not permitted. When viewed against the historical use of quotas as a tool to limit the employment of some groups, the words of caution may have been necessary. Nevertheless, the statement did not provide the strong support needed to ensure that employers promptly adopt goals and timetables to correct discriminatory practices.

The guidance in the policy statement for establishing an affirmative action program was only cursory. It did not clearly dictate the circumstances under which goals and timetables must be used.[260] The statement did not require that employers develop a comprehensive inventory of all employees by organizational unit and pay grade, cross-tabulated by race, ethnicity, and sex to determine any underutilization.[261] It did not state that when such a survey demonstrates an underutilization, goals and timetables must be set.

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[257] Remarks by Leonard Garment to equal employment opportunity officers of the Department of the Interior, Gaithersburg, Md., Mar. 21, 1973. This policy is also set forth in memorandum from Robert Hampton, Chairman, U.S. Civil Service Commission; J. Stanley Pottinger, Assistant Attorney General; Philip J. Davis, Acting Director, Federal Contract Compliance; for U.S. Attorney *et al* ., "Federal Policy Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems," Mar. 23, 1973. In 1969 the Attorney General issued a formal opinion upholding the legality of the Revised Philadelphia Plan, 42 Op. Att'y Gen. No. 37 (1969). This plan, developed by the Department of Labor to implement Executive Order 11246 (3 C.F.R., 1964–1965 Comp., p. 339), with regard to certain Federal construction contracts in the Philadelphia area, required that each bidder must "set specific goals of minority manpower utilization." This opinion, however, related solely to a delineation of that which was permissible under the affirmative action obligation of the Executive order and was not an attempt to make a definitive statement on the difference between goals and quotas or to define generally the limits of affirmative action. See also, Contractors Ass'n of Eastern Pa. v. The Secretary of Labor, 442 F. 2d 159 (1971).

[258] Garment remarks, *supra* note 257.

[259] *Id* .

[260] There were other examples of the lack of instruction in this policy statement. Although it acknowledged that where it was appropriate to establish goals, the "goals should be reached through such recruiting and advertising efforts as are necessary and appropriate," it did not instruct that a nondiscriminatory applicant pool be developed or that sources such as minority and women's colleges, minorities and women in training, or minorities and women in community development programs be utilized in establishing an applicant pool. Similarly, although the statement indicated that the number of vacancies expected should be taken into account in setting realistic goals, it did not make clear that turnover rate, rate of interviews, and upgrading and promotion actions are important factors in calculating a vacancy rate.

Positive guidance in the area of goals and timetables was sorely needed. Federal, State, and local government and private employers were confused by Federal equal opportunity law and regulations. In fact, one of the factors which precipitated the drafting of administration policy on goals and timetables was advice requested by the County of Sacramento, California[262] The county was uncertain about the legality of an affirmative action rule it had passed and therefore requested a Federal opinion.

The rule provided for a public hearing to determine a) whether the number of minority[263] employees in any given personnel classification was disproportionately low, and b) if so, whether the disproportionate representation was caused by discriminatory employment practices. In the event that the determinations showed underrepresentation due to past discrimination, the rule permitted the Sacramento County Civil Service Commission to take action similar to that which had been required by the courts where discrimination was found.[264] The county civil service commission was empowered to order that minority personnel be appointed from a list of eligible persons on a percentage basis until the underutilization was corrected. Thus, the Sacramento rule required ratio hiring, but only where there was a discriminatory underutilization of minorities and then only from a pool of applicants who had been certified as eligible.

The Federal response to Sacramento County's rule, authored by Leonard Garment's office in the White House, was disapproval. In April 1974 the Federal Government instructed Sacramento County to rewrite its rule.[265] The county was told to make clear that "preferential treatment is not permissible and that the rule is an affirmative action program designed to overcome the effects of past discrimination"[266] and that goals must be based on the availability of persons in the job market with the ability to perform the job in question.[267]

C. School Desegregation

The Nixon administration considered that some of its most significant achievements were in the area of school desegregation. It reported that the proportion of children in all-black schools in the South had been reduced from 68 percent in 1969 to 8 percent in 1973 and that "the dual school system had been virtually eliminated."[268]

In fact, progress was not so dramatic. Much of the progress in the South occurred as a result of desegregation plans developed under the Johnson administration.[269] Moreover, in 1972, 54 percent of all black children in the South were still attending schools which were 50 to 100 percent minority, and 71.7 percent of all black children in the North and West were attending such schools.[270] Many black children continued to attend schools which were 80 to 100 percent black.[271] In addition, children of other racial and ethnic backgrounds remained essentially segregated. In 1972 for example, 56 percent of all public school pupils of Spanish origin attended schools which were 50 to 100 percent minority. In the States of Connecticut, Illinois, New Jersey, and New York, over 70 percent of pupils of Spanish origin attended such schools.[272]

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[261] This contrasts sharply with this Commission's *Statement on Affirmative Action:*

> Essential to an affirmative action program is the development of a comprehensive inventory of all employees by race, sex, and ethnicity. Data should be collected by organizational unit and by pay grade. It is important that figures be collected concerning the number accepted and rejected, including the reasons for rejections, promotions, training opportunities offered, terminations, awards, transfers, and other matters relating to employee work conditions. These figures should be compared for each job category with estimates which are made of the availability of women and each minority group within the recruiting area designated. . . . *Statement on Affirmative Action, supra* note 255, at 16.

The duty to make a self-determination as to the need for affirmative action is outlined in Executive Order 11246, as amended, which prohibits discrimination in employment by Federal contractors and construction contractors on federally assisted projects. This self-analysis requirement appears in regulations promulgated by the Office of Federal Contract Compliance of the Department of Labor which require: "An analysis of all major job classifications at the facility, with explanation if minorities or women are currently being underutilized in any one or more job classifications. . . ."41 C.F.R. §60-2.11(a) (1975).

[262] 1973 Patterson interview, *supra* note 47.

[263] Sacramento County's ruled defined "minority" as including women.

[264] In Carter v. Gallagher, a Federal court of appeals required a program of hiring a ratio of minority applicants. The court held:

> Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis. Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1972), cert. den. 406 U.S. 950 (1972).

The same remedial principle of ratios was adopted by the court in Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969), requiring a union, which in the past had discriminatorily excluded minorities from membership, to refer for employment, in its capacity as a hiring hall, whites and blacks on an alternating basis. See also EEOC v. Elevator Constructors Local Union No. 5, 398 F. Supp. 1237 (E.D. Pa. 1975), which held that a labor union found to have engaged in a pattern and practice of exclusion of black workers from memberships and work opportunities must initiate into union membership eligible black probationary helpers, as well as to take steps to recruit, train, and refer qualified black applicants to achieve a goal of 23 percent minimum black union membership. See, also upholding a one-for-one ratio: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (hiring of Alabama State police); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (hiring of Mississippi State police); United States v. Local 10 Sheet Metal Workers, 3 CCH EPD @8068 (D. N.J. 1970) (referral of temporary apprentices or seasonal help); United States v. Central Motor lines, 325 F. Supp. 478 (W.D.N.C. 1970) (hiring of road drivers).

[265] Letter from Robert E. Hampton, Chairman, U.S. Civil Service Commission to Gerald M. Pauly, Director, Department of Personnel Management, County of Sacramento, Calif., Apr. 25, 1974. The letter was approved by EEOC, the Departments of Labor and Justice, and the White House. A draft of this letter, substantially the same as that finally written, was dated July 17, 1973. The original reactions to the rule by Federal agencies varied—EEOC stated that the ordinance was required by the Equal Employment Opportunity Act of 1972; the Civil Service Commission said the ordinance was illegal. 1974 Patterson interview, *supra* note 18.

[266] Hampton letter, *supra* note 265.

[267] *Id.*

[268] Richard M. Nixon, State of the Union Message, Jan. 30, 1974. See also Pottinger article, *supra* note 232; and White House factsheet, *supra* note 232. For a critical discussion of the Nixon administration's activities in the area of school desegregation, see L.E. Panetta and P. Gall, *Bring Us Together* (1971).

The Domestic Council expended much effort on methods of accomplishing public school desegregation, especially after the April 1971 Supreme Court decision in *Swann* v. *Charlotte-Mecklenberg County Board of Education* [273] in which the Supreme Court upheld the utility and validity of pupil transportation, i.e., "busing" as a means to dismantle previously *de jure* segregated school systems. Additionally, the White House called upon prominent educators, minority group leaders, and scholars for their views on desegregation and busing.[274]

The White House staff monitored lower court decisions to see whether they went beyond the requirements of *Swann* .[275] In Mr. Nixon's television address of March 16, 1972, he stated, in part:

> But what we need now is not just speaking out against more busing. We need action to stop it. . . .The *supra* note 27, at 8. reason action is so urgent is because of a number of recent decisions of the lower Federal courts. Those courts have gone too far—in *some* cases beyond the requirements laid down by the Supreme Court—in ordering massive busing to achieve racial balance.[276] [Emphasis added.]

These remarks showed that even when courts ruled consistently with and not beyond *Swann* , some were still going "too far" for the Nixon administration.[277] President Nixon at no time publicly made clear what criteria were used to judge if a court decision had gone "too far." In the course of responding to a question from then Secretary of the Treasury John B. Connally at a gathering of guests at the Secretary's Floresville, Texas, ranch in April 30, 1972, President Nixon said: "If you read the [court decisions] they never use the term 'racial balance,' but there are over twenty-three that we already have identified where that is exactly what the court was ordering."[378]

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[269] Department of Health, Education, and Welfare (HEW) guidelines for school desegregation, issued in March 1968, stated:

> Generally school systems should be able to complete the reorganization necessary for compliance with the law by the opening of the 1968-69 or, at the latest, 1969-70 school year. HEW, "Policies on Elementary and Secondary School Compliance" with Title VI of the Civil Rights Act of 1964 (March 1968).

Leon E. Panetta, former Director of HEW's Office for Civil Rights, commented, "Naturally the districts which had been footdragging for years ignored the 1968-69 date and fixed their eyes on 1969-70." *Bring Us Together* , *supra* note 268.

[270] Department of Health, Education, and Welfare, Fall 1972 Racial and Ethnic Enrollment in Public Elementary and Secondary Schools [hereinafter referred to as Fall 1972 statistics]. As of June 1974, these were the latest HEW statistics on school enrollment.

[271] *Id* . For example, in Illinois, which was the most highly segregated State in the country according to HEW data, more than 77 percent of the students were enrolled in schools that were 80 to 100 percent black. More than half the black public school students in New York, New Jersey, Pennsylvania, Ohio, and Michigan were enrolled in schools that were 80 percent or more black.

[272] Fall 1972 statistics, *supra* note 270.

[273] 402 U.S. 1 (1971).

[274] 1973 White House response, *supra* note 23.

[275] After Swann, the Departments of Health, Education, and Welfare and Justice undertook the review of school desegregation plans across the South to see if revision was warranted in light of the Supreme Court's decision. The Domestic Council staff worked with HEW's Office for Civil Rights (OCR) and with the Department of Justice, coordinating an analysis of the impact of court-ordered and voluntary desegregation plans. The Domestic Council received weekly listings of case developments from the Department of Justice and had periodic input from OCR. Part of this evaluation was to compare developments with Presidential policy and see if adjustments were required; if so, the Domestic Council staff developed the options available for making adjustments.

If a review of a judicial development showed it was not in line with Presidential policy, two ways of proceeding were available, one litigative, the other legislative. The Department of Justice might intervene in a suit and argue the Nixon administration's position, or, when deemed appropriate, the Domestic Council might develop legislative proposals. The Domestic Council staff, together with DOJ and OCR personnel, constituted a working group on school desegregation. Mead interview, *supra* note 49.

[276] 8 *Weekly Compilation of Presidential Documents* 590 (Mar. 20, 1972). See also Mead interview, *supra* note 49. As of the summer of 1973, the Domestic Council staff continued to match the evolution of court decisions with Nixon administration policy and to keep a tally of the status of cases around the country.

[277] In August 1969, during his first administration, President Nixon expressed personal doubts about Supreme Court-ordered desegregation, making it psychologically more difficult for the citizens in the affected school districts to comply willingly with the Court's order. The Nixon administration requested and won a delay in the desegregation of several Mississippi school districts. At that time, this Commission charged the Nixon administration with leading a major retreat in the struggle for meaningful school desegregation. In October of the same year, the Supreme Court unanimously refused to uphold the delay. See Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), *reh. den.* , 396 U.S. 976 (1969). President Nixon announced his intent to carry out the Court's directive, but stated, "I believe in carrying out the law even though I may have disagreed as I did in this instance with the decree." See *Congressional Quarterly* , 641, Mar. 25, 1972.

This expression of doubt was reminiscent of President Eisenhower's wavering in the months before the Little Rock crisis. For information on the crisis, see B. Hays, a *Southern Moderate Speaks* ch. VI (1959); Hearings before the Sen. Comm. on the Judiciary, 85th Cong. 2nd Sess., Nomination of W. Wilson White (1958), and 41 *Opinions of the Attorney General* No. 67 (1957). As one commentator noted, President Eisenhower's indecision "gave a moral base for immoral disobedience." See Charles Abrams, "New York and Little Rock," address before the New York Women's Bar Association, Oct. 15, 1958.

President Nixon had spoken out concerning school desegregation, stating, 'Conscience and the Constitution both require that no child should be denied equal educational opportunity."[379] More often, however, his frequent messages[380] concerning this subject focused on his opposition to busing as a mechanism for achieving school desegregation, a position which, in turn, received great opposition from black leaders.[381] Although it is laudable that the President spoke out so frequently on civil rights issues, it is disappointing that it was merely to support legislation which would limit the means available for school desegregation, legislation which would amount to a declaration that the national policy would henceforth tolerate racial segregation in its public schools.[382]

D. Housing

In 1971 President Nixon asserted that denial of equal housing opportunity to a person on the ground of race would not be tolerated by his administration, whether practiced overtly or indirectly through such practices as price and credit discrimination.[383] The basic work for this statement was prepared in the office of Leonard Garment. This office also provided encouragement to the Department of Justice in the Federal suit against Black Jack, Missouri.[384] On the whole, however, the Nixon administration did not provide adequate leadership to ensure that minorities and women have an equal opportunity to decent and safe housing.[385]

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[378] 8 *Weekly Compilation of Presidential Documents* 815 (May 8, 1972).

[379] Richard M. Nixon, Message to the Congress, Mar. 17, 1972.

[380] During his first Administration, President Nixon made statements opposing busing in September 1969, December 1969, March 1970, May 1970, and August 1971. Statements during his second administration include those made: (1) in response to questions asked during a news conference on Feb. 10, 1972; (2) in an address to the Nation on Mar. 16, 1972, and in a message to Congress on Mar. 17, 1972; (3) in answers to questions of guests at the Floresville, Tex., ranch of then Secretary of the Treasury John B. Connally on Apr. 30, 1972; (4) in response to questions at a news conference on June 22, 1972; (5) in an address from Camp David on Mar. 23, 1974; and (6) in a statement on May 22, 1974. The Mar. 16, 1972, statement was a major one. In a television address, President Nixon announced two legislative proposals, the Student Transportation Moratorium Act and the Equal Educational Opportunities Act. The following day, a message to Congress on busing restated the proposals. Interestingly, only the message to the Congress, not the televised address to the Nation early in an election year, set out the full degree to which President Nixon's proposals, if enacted, would tie the hands of the Federal courts in their ability effectively to dismantle previously *de jure* segregated school systems. The Equal Educational Opportunities Act, for example, would make busing a last resort—seventh on a list of priority methods of desegregating schools—and it could be ordered then only if there was clear and convincing evidence that no other method would work; children under the sixth grade could in no event be bused under a court order; busing could not be ordered on other than a temporary basis; school districts would be granted stays until courts of appeals reviewed district court orders; busing orders would be limited in effect to not more than 5 years' duration, other desegregation orders being limited to 10 years, provided there was good-faith compliance; and court orders involving busing issued before the effective date of the act could be reopened upon request of a school board to have the order modified to conform to the new legislation. See 8 *Weekly Compilation of Presidential Documents* 590–96 (Mar. 20, 1972); see also 30 *Congressional Quarterly Weekly Report* 640 (Mar. 25, 1972). The office of Leonard Garment aided in the preparation of President Nixon's statements and the legislative proposals. 1973 White House response, *supra* note 23.

[381] See statement by Clarence Mitchell, director of the Washington Bureau of the National Association for the Advancement of Colored People before House Judiciary Subcomm. No. 5, Apr. 13, 1972; statement by Clarence Mitchell to the Senate Subcomm. on Constitutional Rights, Feb. 21, 1974; statement by Vernon Jordan, executive director, National Urban League, Inc., before the National Press Club, Mar. 11, 1973; Vernon Jordan, *New York Times*, Jan. 16, 1974, at 61, col. 1; and *Congressional Newsletter*, June 1974.

[382] The Commission's opposition to proposals for congressional action to limit busing for the purposes of school desegregation was set forth in testimony by Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, before the House Comm. of Education and Labor, Apr. 11, 1972; statement by Stephen Horn before Subcomm. no. 5, House Judiciary Comm., May 10, 1972; statement by Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, before the House Comm. on Education and Labor, July 28, 1972; testimony by Stephen Horn before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., Feb. 21, 1974; letter from Arthur S. Flemming, Chairman; Stephen Horn, Vice Chairman; Frankie M. Freeman, Robert S. Rankin, and Manuel Ruiz, Jr., members; and John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Harrison Williams, Chairman, Committee on Labor and Public Welfare, United States Senate, May 6, 1974; and letter from Arthur S. Flemming *et al* . to Carl D. Perkins, Chairman, Committee on Education and Labor, United States House of Representatives, June 10, 1974.

[383] *Statement by the President on Federal Policies Relative to Equal Housing Opportunity* June 11, 1971. President Nixon's fair housing statement was strong and affirmative in a number of respects. It emphasized the need to overcome the effects of past discrimination, to eliminate future discriminatory practices, and to establish results as the measure by which progress in fair housing was to be evaluated.

Nonetheless, other aspects of the statement were less encouraging. President Nixon stated that the Federal Government would not impose federally assisted housing programs on communities which did not want them. Thus, communities were left free to select Federal programs, such as water and sewer facility assistance and open space grants, while rejecting lower-income programs. President Nixon also emphasized a sharp distinction between residential segregation resulting from race and that resulting from income, stressing that the Nixon administration would act forcefully with respect to the former but not to the latter. This distinction, while a real one, was not nearly so clear as the statement suggests. Thus, the statement served to reinforce the racial exclusionary policies and practices of many suburban communities. Indeed, since discrimination against minorities, e.g., in education and employment, had resulted in the failure of many minorities to earn adequate income for unsubsidized housing, the *Congressional Quarterly* interpreted the 1971 statement as indicating that the Nixon administration would not interfere with any local zoning laws which had the effect of excluding racial or ethnic minorities for economic reasons. *Congressional Quarterly Weekly Report* 2362 (Nov. 13, 1971). For an analysis of the problems of exclusion of minorities from suburbs and recommendations to ameliorate the problems, see U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (July 1974).

[384] In June 1971 the Federal Government filed suit alleging that the city of Black Jack, Mo., had violated the Fair Housing Act by passing a zoning ordinance prohibiting construction of all new multiple-family dwellings. United States v. City of Black Jack, Missouri, 372 F. Supp. 319 (E. D. Mo. 1974). On appeal the ordinance was found to have a racially discriminatory effect and was therefore held to be illegal. United States v. City of Black Jack, Missouri 508 F. ed 1179, 1184 (8th Cir., 1974), cert. denied 422 U.S. 1042 (1975).

[385] As indicated previously, the funding of the Federal fair housing enforcement program remained highly inadequate. See *To Provide. . .For Fair Housing* , *supra* note 243.

In January 1973 the Nixon administration terminated most funds for federally subsidized housing. This housing moratorium had disastrous effects on the availability of housing for low- and moderate-income persons, many of whom were minorities and women, and became the focus of criticism by minority and fair housing groups.[286] As of July 1974 the moratorium was still in effect.[287] President Nixon's administration had announced plans to provide funds under Section 23 of the Department of Housing and Urban Development Act of 1965[288] to ease the low- and moderate-income housing situation, [289] but it was too early at that point to evaluate the effect of that program.

Other plans to address the critical lack of housing in the Nation were directed toward easing mortgage financing in general and not toward ameliorating the housing situation for middle- and low-income families.[290] Moreover, the Nixon administration had foregone an excellent opportunity for increasing housing opportunities for low- and moderate-income families in its creation of the Federal Property Council,[291] which was created to:

> . . .develop and review Federal real property policies with respect to their relationship to other policies and to the objectives of the executive branch of the Government and recommend to the President such Federal real property policies or reforms of policies as it deems necessary.[292]

Federal surplus property can often provide an excellent source of land for low- and moderate-income housing, but in accordance with Federal policy, such land is generally used for parks. The White House was indifferent to suggestions for the development of a policy to use such property for housing. For example, in 1973 the Center for National Policy Review[293] issued a detailed report on the potential of Federal surplus property for low- and moderate-income housing.[294] The center transmitted the report to the Chairman of the Federal Property Council, Anne Armstrong, a counsellor to the President. Ms. Armstrong acknowledged[295] receipt of the report but subsequently disavowed knowledge of it.[296] A copy of the report was again transmitted to Ms. Armstrong, and shortly thereafter her assistant indicated with certainty that the Council would soon be considering the fundamental policy question of the utilization of surplus Federal property for low-cost housing developments.[297] In June 1974, however, the Executive Secretary of the Federal Property Council stated that neither the

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[286] The moratorium and the response it evoked are discussed further in *id*. at ch. 1. The Commission had commented on several occasions that the Nixon administration's proposed housing programs disregarded the need for subsidized housing. See also letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Rep. William A. Barrett, Chairman, House Committee on Banking, Currency, and Housing, Subcommittee on Housing and Community Development, Oct. 31, 1973, and letters from John A. Buggs to Naomi R. Sweeny, Assistant Director for Legislative Reference, OMB, Sept. 28, 1973, and Oct. 2, 1973.

[287] Telephone interview with Laurence D. Pearl, Director, Office of Program Standards and Analysis, HUD, July 5, 1974.

[288] 42 U.S.C. §1421b (1970).

[289] HUD guidelines for this program were published April through July 1974. (24 C.F.R. §§1272, 1274, 1276 and 1279 (1975)).

[290] In mid-May 1974 President Nixon announced plans to authorize $10.3 billion to improve the housing market. The funds would be divided into three packages: (1) the Federal Home Loan Bank System was authorized to lend $4 billion at lower than normal interest rates to member savings and loan associations, which the savings and loan associations could,in turn, use for the financing of mortgage loans; (2) a commitment by the Government National Mortgage Association (Ginnie Mae) to "buy" Federal Housing Administration or Veterans Administration approved mortgages at a set interest rate slightly below the going market rate, in effect, a type of price support; and (3) commitments of $3 billion for conventional mortgages, i.e. mortgages not backed by the Government. The Federal Home Loan Mortgage Corporation, which is owned by the Federal Home Loan Bank system, would pledge to builders that it would buy mortgages at 8.75 percent interest. *Statement by the President on Housing,* Office of the White House Press Secretary, May 10, 1974. There was some question whether all of this $10.3 billion would, in fact, be used for mortgage finance. For example, savings and loan associations may have been deterred from borrowing funds from the Federal Home Loan Bank Board because they were already heavily into debt with the Board. If they did borrow funds, there was the possibility that they would be put into high-yielding, nonhousing-related investments, as they were permitted to do with up to 20 percent of their assets. See Kenneth Harvey, "All housing Funds May Not Be Spent," *Washington Post,* May 18, 1974, at E1. Mr. Harvey was managing editor of the *Housing and Urban Development Reporter,* published by the Bureau of National Affairs, Inc., Washington, D.C.

[291] The Federal Property Council, created by Exec. Order No. 11724 on July 1, 1973, supersedes Exec. Order No. 11508 of Feb. 10, 1970, and Exec. Order No. 11560 of Sept. 23, 1970. It abolished the Property Review Board.

[292] Exec. Order No. 11724. The Council is also directed to receive reports of GSA on the real property holdings and usage of Federal agencies, with particular attention to resolving conflicting claims on any property in those reports.

[293] The Center for National Policy Review is a nonprofit organization for research and review of national policies with urban and racial implications. It is affiliated with the Law School of the Catholic University of America, Washington, D.C.

[294] Center for National Policy Review, *A Report on the Potential of Federal Surplus Property* (June 1973).

[295] Letter from Anne Armstrong, Counsellor to the President, the White House, to William L. Taylor, director, Center for National Policy Review, July 12, 1973.

[296] Armstrong interview, *supra* note 92. At that interview, Commission staff informed Ms. Armstrong that they wished to ask questions concerning her civil rights responsibilities in three areas: women, persons of Spanish origin, and the Federal Property Council. Ms. Armstrong responded that she was unaware that there were any civil rights issues implicit in the disposition of surplus Federal property.

[297] Letter from David Wheat, assistant to Counsellor Anne Armstrong, the White House, to Cynthia N. Graae, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Aug. 28, 1973. Mr. Wheat indicated that the Federal Property Council was familiar with the center's report. The executive secretary of the Council subsequently wrote to the Center for National Policy Review that he had "not yet had an opportunity to review your report in detail." Letter from C.R. Lane, executive secretary, Federal Property Council, to Daniel A. Searing, special assistant, Center for National Policy Review, School of Law, Catholic University, Sept. 12, 1973.

Council nor its staff had given consideration to the possibility of drafting a policy on the use of surplus property for low- and moderate-income housing, and that, furthermore, the Council did not plan to undertake any activity in this area.[298]

E. Business Enterprise

President Nixon reported as a significant accomplishment that "Federal aid to minority business enterprise—one of the cornerstones of the administration's effort to open new economic horizons for minority group members—has nearly tripled since 1970."[299] Indeed, Federal outlays for assistance to minority business enterprise had substantially increased, from $459 million in fiscal year 1971[300] to a projected $1,202 million in fiscal year 1975.[301]

Not all businesses needing assistance received it, however, and where it was provided, sometimes it was not timely.[302] The "assistance" provided by the Federal Government, moreover, was not only Federal aid in the form of grants and technical assistance. For example, an analysis of supporting data for the fiscal year 1974 budget[303] showed that of $1,185 million in anticipated outlays for that year, less than $127 million was to be provided in the form of grants[304] and less than $57 million in the form of technical assistance.[305] In fact, Federal "assistance" to minority business enterprise consisted primarily of contracts and direct and insured[306] loans.

It is misleading to characterize contracts as "assistance" equivalent to grants and technical aid. Such a characterization creates the impression that the benefits derived from a Federal contract are one-sided on the part of the contractor, neglecting the fact that to obtain payment from the Federal Government, the contractor undertakes an obligation to provide goods or services. Moreover, the characterization of contracts as "assistance" rather than as steps to remedy past discrimination in the Federal procurement program fails to acknowledge that there is a Federal obligation not to discriminate against minorities in the awarding of Federal contracts. Minorities have never enjoyed full participation in Federal contracts.[307] Indeed, the level of Federal effort for minority contractors has been insignificant. The Federal Government annually spends over $100 billion in procurement.[308] Outlays for contracts with minority firms were about $400 million in fiscal year 1973,[309] less than 1/25 of a percent of total Federal dollars expended on contracts.

It is also misleading to consider the full value of business loans as "assistance." Insured loans are made at little cost to the Federal Government.[310] Direct loans, while they initially involve Federal outlays, are generally repaid. The ultimate cost to the Government is from defaulted loans and any subsidies provided in interest rates.

The rate of participation of minorities in Federal business loan programs was more respectable than in Federal contracts. In fiscal year 1973, 15 percent of all direct business loans went to minorities.[311] It should be noted, however, that this was a decrease from the 1971 level, when 19 percent of all such loans went to minorities. In fact, the total value of loans made to minority business increased at a far slower rate than the value of total business loans. The amount of money expended on business loans to minorities had increased from fiscal year 1971 to fiscal year 1973 by only 43 percent, compared with an increase of 96 percent in the total business loans made by the Federal Government.[312] Moreover, although the average size of business loans to minorities had increased from \$.27 million in 1971 to \$.37 million in 1973, in both years the average size of loans made to minorities was about half of the average size of loans made to nonminorities.[313]

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[298] Telephone interview with C.R. Lane, June 3, 1974. Mr. Lane indicated that the Council had written issue papers on such subjects as the relationship between the use of Federal surplus property and the Nixon administration's energy program and the use of surplus property for air fields.

[299] Richard M. Nixon, 1974 State of the Union Address, *supra* note 268.

[300] *Budget of the United States Government, Special Analysis N* (1973).

[301] *Budget of the United States Government, Special Analysis L* (1975). Actual outlays for fiscal year 1973 were $942 million. As of June 1974, these were the latest available data on actual outlays.

[302] Such problems were uncovered in a General Accounting Office (GAO) study of 845 randomly selected minority businesses in Chicago, Los Angeles, and Washington, D.C. The study showed, for example, that 50 percent of minority businesses needing managerial assistance had not received it. GAO found that of the businesses surveyed, 232 or 27.5 percent were failures; 213 or 25.0 percent had serious problems; 260 or 30.7 percent were probable successes; and in 140 cases or 16.6 percent, the success of the business could not be determined. Comptroller General, *Limited Success of Federally Financed Minority Businesses in Three Cities* (November 1973).

[303] The analyses in this section are based upon data supplied by the OMB unless otherwise indicated.

[304] *Special Analysis L* for fiscal year 1974 shows that an estimated $1,575 million would be spent in grants for minority assistance programs in that year. These included grants for minority business enterprise, Indian programs, and minority higher education assistance. OMB data show that only $127 million of these grants were to be used for the combined categories of minority business enterprise and higher education. (The data available do not break out expenditures for these two categories separately.) The remainder, $1,448 million, was to be used for Indian programs. Over 95 percent of the grant assistance for non-Indian programs was provided by the Departments of Agriculture (USDA), Commerce (DOC), Health, Education, and Welfare (HEW), and Housing and Urban Development (HUD). USDA supplied $24 million in grants; DOC, $21 million; HEW, $57 million; and HUD, $21 million.

[305] Over 86 percent of the technical assistance for non-Indian programs was provided by the Department of Commerce, which expended almost $50 million in technical assistance.

[306] Insured loans are loans made by private institutions which the Federal Government promises to repay should the borrower default.

[307] Limitations in the Federal contracting program with regard to minorities and women are discussed in U.S. Commission on Civil Rights, *Minorities and Women as Government Contractors*, May 1975.

[308] Council of Economic Advisors, *Economic Indicators* 37 (June 1974). The total Government purchase of goods and services for fiscal year 1972 was $103.2 billion; the preliminary figure for fiscal year 1973 was $104.5 billion.

[309] Actual outlays for procurement from minority firms were $283 million in fiscal year 1972. *Special Analysis L* (1974); they were $388.25 million in fiscal year 1973, *Special Analysis L* (1975).

[310] Insured loans involve no actual expenditures by the Federal Government unless the loans are defaulted. Nonetheless, the *Special Analysis* includes under "Federal Civil Rights Outlays" the obligated value of the loans, which as noted in the *Special Analysis* do not necessarily represent any Federal expenditures. See *Special Analysis of the Budget* for fiscal years 1973, 1974, and 1975.

[311] Five percent went to persons of Spanish origin, 8 percent to blacks, and 2 percent to all other minorities.

Through most of 1973 there was little progress with regard to female business enterprise, which was a badly neglected area. During fiscal year 1972 and the first 10 months of fiscal year 1973, the Small Business Administration approved only 155 loans to female businesses, for a total of slightly over \$3 million.[314] Thus, for this 22-month period, female businesses obtained less than one-third of 1 percent of all business loans made.[315] During fiscal year 1974 the number of business loans to women increased to 1,947 for a total sum of slightly more than \$91 million. In 1974 female loans accounted for only 7 percent of all approved loans or 5 percent of the total amount loaned.[316]

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[312] In fiscal year 1971, the value of total loans approved was \$1,122.2 million and the value of loans to minorities was \$213.8 million. In fiscal year 1973, the values were \$2,196.2 million and \$334.0 million, respectively.

[313] In fiscal year 1971, the average value of a business loan was \$.52 million. By fiscal year 1973, this had increased to \$.65 million.

[314] Data supplied by the SBA, in attachment to response to U.S. Commission on Civil Rights April 1973 questionnaire contained in letter from J. Arnold Feldman, Deputy Director for Compliance, Office of Equal Employment Opportunity and Compliance, Small Business Administration, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 1, 1973.

[315] *Minorities and Women as Government Contractors*, *supra* note 307.

[316] Small Business Administration, *The Facts About Women as Users of SBA Services* 2 (June 1976).

Part B: August 1974 to August 1976

I. ORGANIZATION AND STAFFING

A. General

In fiscal year 1976, President Ford was served by a staff of 1,661 people in the many offices and councils within the Executive Office of the President.[1] Principal among these units, which are listed in exhibit 1.3, were the Office of Management and Budget (OMB), the Domestic Council, and the White House Office.[2] OMB, with a staff of 682, was responsible for assisting the President to increase efficiency and economy in the Federal Government. The Domestic Council, with a staff of 40, formulated, coordinated, and advised the President on domestic policy. The White House Office, with a staff of 500, assisted the President as he might direct.

In practice, there was very little distinction between the staffs of the White House Office and the Domestic Council although each had its own institutional identity and budget. Staff members of both units shared the same building and the offices were intermingled. The close proximity allowed for frequent discussion among the two staffs and for the undertaking of joint projects.

B. The White House Office

The principal units in the White House Office included two offices with civil rights duties—the Office of the Counsel and the Office of Public Liaison. The activities of the Office of the Counsel illustrate some of the diverse functions the White House staff had. This office, which as of March 1976 consisted of the Counsel to the President, the Deputy Counsel, and three associate counsels,[3] served as legal advisor to the President. It reviewed all matters of substance and all policy papers that were consid-

Exhibit 1.3

Executive Office of the President
Estimated Total Full-Time Positions
Fiscal Year 1976

White House Office	500
Executive Residence	82
Special Assistants to the President	29
Council of Economic Advisors	46
Council on Environmental Quality	44
Council on International Economic Policy	29
Council on Wage and Price Stability	44
Domestic Council	40
National Security Council	72
Office of Management and Budget	682
Office of Telecommunications Policy	48
Special Representative for Trade Negotiations	45
TOTAL	**1,661**

Source: *Budget of the United States*, Fiscal Year 1977, Appendix ered by the President, even when these contained no obvious legal issues.[4] The office also carried out the legal work of the White House, such as clearing all conflict of interest statements made by Presidential appointees. In addition, each associate counsel was assigned to work with White House staff, referred to informally as "clients,"[5] to provide those staff members with legal assistance in their areas of involvement.[6]

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[1] *United States Budget, Fiscal Year 1977, Appendix* at 815–816. [hereinafter referred to as 1977 *Budget Appendix*]. The size of the Executive Office staff decreased by 152 employees since 1974. (See exhibit 1.1.) Most of the offices from the Nixon administration were retained, with the exception of the Special Action office for Drug Abuse Prevention. Much of the decrease in staff resulted from the dismantling of this office. The Domestic Council had a significant decrease in staff (75 to 40) as did the Council of Economic Advisors (64 to 46) Environmental Quality (56 to 44), and the Office of Telecommunications Policy (65 to 48). *Id* .

[2] OMB is discussed in ch. 2, *infra* . The Domestic Council is discussed in sec. IV *infra* , and the White House Office is discussed at greater length *infra* this section.

[3] As of Mar. 20, 1976. Philip W. Buchen was the Counsel to the President and Edward C. Schmults was Deputy Counsel. Barbara Greene Kilberg, Kenneth A. Lazarus, and James A. Wilderotter were associate counsels. See 8 *National Journal Reports* 377 (Mar. 20, 1976).

While there were no permanent civil rights staff in the Office of the Counsel, it frequently worked on civil rights issues. In late 1975 one associate counsel was spending more than 50 percent of her time on civil right matters, including Native American affairs, Title IX of the Education Amendments of 1972, the Arab boycott, and busing.[7]

One of the most highly visible offices at the White House was the Office of Public Liaison. This office was established to provide a dialogue between the administration and various segments of the public, including blacks, persons of Spanish origin, Native Americans, Asian Americans, youth, women, labor unions, consumer groups, and business trade associations. The creation of this office was an outgrowth of President Ford's belief that the public consists of people with shared interests who group themselves together and of his commitment to be accessible to the public.[8]

President Ford made clear that this commitment extended to all segments of the public. In his August 12, 1975, address to a joint session of Congress, he stated:

> . . .As President, I intend to listen. [I] intend to listen to the people themselves—all the people. . . .I want to be sure we are all tuned in to the real voice of America. . . .When I say all the people I mean exactly that. To the limits of my strength and ability, I will be the President of black, brown, red and white Americans, of old and young, of women's liberations, [sic] and male chauvinists[9] and all the rest of us in between, of the poor and the rich, of native sons and new refugees, of those who work at lathes or at desks or in mines or in the fields, and of Christians, Jews, Moslems, Buddhists, and atheists. . . .[10]

Thus, the President pledged that he would listen to the needs of all groups, including the Nation's minorities and women. The Office of Public Liaison was the President's mechanism for listening.

As of March 1976, it was headed by William J. Baroody, Jr., Assistant to the President for Public Liaison. Among the staff of this office were five Special Assistants to the President who had responsibilities pertaining to minorities and women.

Each Special Assistant handled liaison with one or more groups: a Special Assistant for Human Resources, who was responsible for communication with Native Americans and Asian Americans; a Special Assistant for Women; a Special Assistant for Hispanic Affairs, who was responsible for communication with Mexican Americans, Puerto Ricans, Cubans, and other Spanish origin groups; a Special Assistant for Minority Affairs, who was responsible for communication with blacks;[11] and a Special Assistant for Ethnic Affairs, who was responsible for communication with such ethnic groups as Polish, Greek, and Italian Americans.[12] This structure, placing a number of Special Assistants with responsibilities for minority and women's affairs within one White House office, was an improvement over the fragmented civil rights structure of the previous administration.[13]

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[4] Policy papers were also circulated to OMB and the Domestic Council. Interview with Barbara Kilberg, associate counsel, Office of the Counsel, the White House, Dec. 22, 1975.

[5] For example, in 1975 Barbara Kilberg served as legal advisor to Patricia Lindh, Special Assistant for Women, Office of Public Liaison, and Theodore C. Marrs, Special Assistant for Human Resources, Office of Public Liaison. *Id*.

[6] 1975 Kilberg interview, *supra* note 4.

[7] See secs. II(D), II(E), III, and VI(C) *infra* for discussions of White House activities on Native American affairs, Title IX, the boycott, and busing, respectively. Prior to November 1975, Ms. Kilberg was spending about 40 percent of her time on the establishment of a concerted Federal effort to curb the discriminatory effects of the Arab boycott. 1975 Kilberg interview, *supra* note 4.

[8] Interview with Theodore C. Marrs, Special Assistant for Human Resources, Office of Public Liaison, (OPL) the White House, Dec. 23, 1975. In 1975 the Special Assistant for Hispanic Affairs described the function of OPL as a link to present the concerns of public groups to the President and other decisionmakers. Interview with Fernando E.C. DeBaca, Special Assistant for Hispanic Affairs, Office of Public Liaison, Dec. 16, 1975. The Special Assistant for Women explained OPL's function as that of a liaison between the executive branch and constituent groups. Interview with Patricia Lindh, Special Assistant to the President for Women's Affairs, and Karen R. Keesling, assistant to Ms. Lindh, Office of Public Liaison, the White House, Dec. 16, 1975.

[9] "Male chauvinists" was the only category the President listed which was united as a group only by its opposition to the rights of another group, i.e., women. His inclusion of this category indicated some lack of sensitivity for women's rights. By way of analogy, it is hardly imaginable that in such an important speech the President would have announced his role as the President of racists and anti-Semites.

[10] President Gerald R. Ford, Address to Joint Session of Congress, Aug. 12, 1974.

[11] Since December 1975, the person holding this position had also assumed responsibility for Asian Americans concurrently with the Special Assistant for Human Resources. Later this duty was also shared with the Special Assistant for Ethnic Affairs. See sec. II(C) *infra*.

[12] As of December 1975, the Special Assistants were: Theodore C. Marrs (Human Resources), appointed by President Nixon on June 6, 1974; Fernando E.C. DeBaca (Hispanic Affairs), appointed by President Nixon on July 19, 1974; Patricia S. Lindh (Women), appointed by President Ford on Dec. 8, 1974; and John C. Calhoun (Minority Afairs), appointed by President Ford on Nov. 21, 1975. Since that time, the position of Special Assistant to the President for Ethnic Affairs was also established. Myron Kuropas was appointed to this position by President Ford on Jan. 6, 1976.

Four of these Special Assistants spent 100 percent of their time on matters of concern to minorities and women, and one worked part-time on such matters.[14] In addition, as of March 1976, there was one other member of the program staff in the office who worked full-time on civil rights matters. This was the assistant to the Special Assistant for Women.[15] In July 1976, the Special Assistant for Human Resources resigned and his responsibilities were disbursed among the other members of OPL, leaving only four special assistant positions.[16] In addition, in August 1976, a Special Assistant for American Indians Affairs was named to work with Cabinet members and other Federal agency heads to improve coordination among programs serving Native Americans.[17]

These Special Assistants were the only staff in the White House with full-time responsibilities relating to minorities or women.[18] Yet they were not responsible for oversight of Federal agency civil rights enforcement activities. They were not policymaking officials.[19] Indeed, the Ford administration did not assign permanent civil rights responsibilities to high level, policymaking officials within the White House Office.

There were no permanent civil rights appointments within the White House Office to fill positions comparable to those held under the previous administration by Leonard Garment, Assistant to the President, and Anne L. Armstrong, Counsellor to the President. High level responsibility for civil rights was shifted to the Domestic Council.[20]

II. ADVOCACY

This section addresses some of the issues of concern to specific groups: blacks, persons of Spanish origin, Asian and Pacific Americans, Native Americans, and women. Many major civil rights issues, such as equal opportunity in employment, housing, education, and business enterprise are the shared concerns of minorities and women, and these major issues are discussed in Section VI. However, White House activities were often addressed to the interest of specific groups, as evidenced by the division of responsibilities in the Office of Public Liaison. This section attempts to analyze the adequacy of these activities.

A. Blacks

Programs relating to blacks were located in the Office of Public Liaison with the Special Assistant

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Of these five people, only two remained on the White House staff in August 1976. See note 16 *infra* .

[13] Including the Domestic Council, there were only three principal White House units with civil rights responsibilities. In contrast, under the Nixon adminstration, persons with civil rights duties were scattered among five different offices, which created confusion about staff responsibility and authority and impeded effective coordination between the offices. For discussion of fragmentation of the civil rights staff, see, pt. A, sec. I *supra* .

[14] This was the Special Assistant for Human Resources. He spent approximately 30 percent of his time on activities pertaining to Native and Asian Americans. His other responsibilities included bicentennial activities and staff work for the Clemency Board, which reviewed appeals for clemency of persons found to have violated certain laws or regulations governing the military.

[15] Ms. Lindh's assistant was Karen R. Keesling. On Mar. 6, 1976, Ms. Lindh resigned as Special Assistant for Women, but was soon replaced by Jeanne M. Holm, appointed Mar. 8, 1976, by President Ford.

[16] These positions were held by John C. Calhoun, (Minority Affairs), see note 12 *supra* .; Thomas Aranda (Hispanic Affairs), appointed by President Ford on July 6, 1976; Myron Kuropas (Ethnic Affairs), see note 12 *supra* ; and Jeanne M. Holm (Women).

[17] 12 *Weekly Compilation of Presidential Documents* 1287–88, (Aug. 30, 1976). This position was held by Bradley H. Patterson, Jr. His functions pertaining to Native Americans were handled on a part-time basis. Mr. Patterson also served in the White House personnel office.

[18] On occasion, other White House staff members worked on minority and women's affairs. These included: James M. Cannon, Assistant to the President and Executive Director of Domestic Council; James H. Cavanaugh, Deputy Assistant and Deputy Director of Domestic Council; Arthur F. Quern, Deputy Director, Policy and Planning Division, Domestic Council; John O. Marsh, Jr., Counsellor to the President; Kathleen A. Ryan, Assistant Director, Consumer and Cultural Affairs, Domestic Council; and two members of the Vice President's staff, Thaddeus A. Garrett, Jr., Special Assistant, and John G. Veneman, Counsellor.

[19] Lindh and December 1975 Marrs interviews, *supra* note 8. It would appear, nonetheless, that the women who served as Special Assistant to the President for Women sometimes played a substantive role in White House policy formulation. One Special Assistant stated that one of her three main responsibilities was advising the President on action he should take on proposed legislation which might affect women and assisting in the development of legislation and other Presidential initiatives. Her other two responsibilities were a) maintaining liaison with national women's organization and Federal advisory committees, and programs concerned with eliminating sex discrimination; and b) recommending women for appointment to high level Federal positions. Interview with Jeanne M. Holm, Special Assistant to the President for Women, and Karen Keesling, assistant to Ms. Holm, Jan. 10, 1977.

[20] The Domestic Council is discussed in sec. IV *infra* . However, with regard to women, under the Nixon Administration, the title of the highest ranking full-time official was Director of Women's Programs for Counsellor Armstrong. There was no official with full-time responsibility for women who reported directly to the President. Under the Ford Administration, the full-time official responsible for women was a Special Assistant to the President.

for Minority Affairs, John C. Calhoun.[21] Prior to Mr. Calhoun's appointment, Stanley C. Scott served in this position under the Ford and Nixon administrations. Under both administrations, one duty Mr. Scott assumed was to gather information on Federal programs which had significant impact upon blacks.[22] In addition, under the Ford administration, Mr. Scott stated that he believed that bringing blacks to see the President was one of his major responsibilities, although under the Nixon administration monitoring agency activities was also a significant function.[23]

There was at least one positive effect of the White House public liaison focus: the White House staff were considered generally more open and approachable than previous administrations, especially in the area of civil rights.[24] Nevertheless, increased emphasis on public liaison was no substitute for meaningful activities to improve Federal programs for blacks.

Since August 9, 1974, the White House acted favorably upon several legislative initiatives with broad implications for blacks. For example, after considerable study of the need for continued protection of minority voting rights,[25] the Congress passed a bill that extended the historic Voting Rights Act of 1965 for 7 years.[26] The President submitted the initial legislation extending the Voting Rights Act,[27] which was considered one of the highest priorities among black civil rights leaders.[28] Congress further extended the act to cover persons of Spanish origin, Native Americans, Asian Americans, and Alaskan natives.[29] According to President Ford, the amendment also permitted "suits to protect the voting rights of citizens in any State where discrimination occurs."[30]

The White House also made inroads into other areas of concern to blacks. Negotiations between the administration and the Congressional Black Caucus led to increased enforcement efforts to stem the flow of heroin and other drugs from foreign countries.[31] The administration indicated strong support for proposed legislation to keep hard drugs from entering this country[32] and for imposition of mandatory minimum prison sentences for persons convicted of trafficking hard drugs.[33] The 1977 Budget requested $1.9 billion for crime reduction programs in fiscal year 1977, of which $300 million would be earmarked for drug law enforcement.[34] In 1975 the Congress enacted legislation that allowed the National Institute of Drug Addiction in the National Institutes of Health to administer drug addiction prevention and treatment programs. The Ford administration proposed that during fiscal year 1977 it would fund a variety of community-based treatment programs for narcotic addicts and drug abusers and would support demonstration programs for monitoring and evaluating the effectiveness of treatment programs.[35]

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[21] The Commission has no direct information on Mr. Calhoun's duties. It should be noted that Commission staff on several occasions have requested a personal interview with Mr. Calhoun. Telephone calls were made to Mr. Calhoun's office during the week of Dec. 8, 1975, and, on Feb. 11, Feb. 20, Feb. 26, Apr. 9, and Apr. 16, 1976. Commission staff also requested an interview with Mr. Calhoun in a letter. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Theodore M. Marrs, Special Assistant to the President for Human Resources, Dec. 19, 1975. On Mar. 25, 1976, Dr. Marrs telephoned the Commission's Acting Assistant Staff Director for Federal Evaluation and stated that previously there had been a question as to the extent to which White House staff were permitted to speak with Commission staff, but clearance, by way of memorandum from the Office of the Counsel, had been granted for cooperation. Dr. Marrs indicated that this meant that members of the Office of Public Liaison were now permitted to talk with Commission staff. As of November 1976, however, no interview had been granted.

[22] For a discussion of Mr. Scott's responsibilities in the Nixon administration, see pt. A, secs. I(B) and II(A) *supra*.

[23] Interview with Stanley S. Scott, Assistant Administrator, Africa Bureau, Agency for International Development, and former Special assistant to the President for Minority Affairs, Jan. 9, 1976. While he had no actual policymaking authority as Special Assistant, Mr. Scott felt his relationship with the President to be personable and, thus, believed that he had some impact on matters which directly affected blacks. *Id*.

[24] See, e.g., interview with George Dalley, Administrative Assistant to Congressman Charles B. Rangel, Apr. 21, 1976.

[25] *Hearings before the House Judiciary Committee on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501; Extension of the Voting Rights Act*, 94th Cong., 1st Sess., ser. 1, pts. 1 and 2 (Feb. 25–Mar. 25, 1975); and *Hearings before the Senate Judiciary Committee on S. 407, S. 903, S. 1297, S. 1409, and S. 1443*, 94th Cong., 1st Sess. (Apr. 8–May 1, 1975) [hereinafter referred to collectively as Senate and House Hearings]. See also, U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (January 1975).

[26] 42 U.S.C. §1973 *et seq*. (1970), as amended (Supp. V. 1975).

[27] For the President's views on the amendments, see letter from Gerald R. Ford, President, to Senator Mike Mansfield, July 21, 1975, printed in 121 *Cong. Rec*. S13379 (1975); and letter from Gerald R. Ford, to Senator Roman L. Hruska, July 21, 1975, printed in 121 *Cong. Rec*. S13382 (1975).

[28] Civil rights organizations strongly supported the extension and strengthening of the Voting Rights act of 1965. See NAACP resolution adopted by the 65th Annual Convention at New Orleans, La. (July 1–5, 1974), *The Crisis*, April 1975. See also, position statement, the State of Black America, by Vernon Jordan, executive director, National Urban League, Inc., Jan. 28, 1976; 121 *Cong. Rec.* E 916 (daily ed., Mar. 5, 1975) (remarks of Congressman Charles B. Rangel); and Congressional Black Caucus, *Position Statement*, presented to the President, Aug. 21, 1974. The Congressional Black Caucus is composed of the 17 black Members of Congress.

[29] The bilingual provisions of this act are discussed in sec. II(B) *infra*.

[30] Remarks of President Ford upon signing the Voting Rights Act extension, 11 *Weekly Compilation of Presidential Documents* 837 (Aug. 21, 1974). The Voting Rights Act of 1965, as amended by Congress in 1970 and again in 1975, protects and strengthens minority citizens' rights to vote throughout the United States. 42 U.S.C. §1973 *et seq*. (1975). It contains permanent provisions that apply to the whole country and prohibit the use of certain voter qualifications, and it establishes criminal penalties for violations. The law also contains temporary provisions which affect States, counties, and communities where minority citizens have experienced difficulty in exercising their right to vote. These include: assignment of Federal examiners to register voters; monitoring of certain State and county elections by Federal observers; Federal review of voting changes in State and local electoral processes; and use of languages other than English for registration and voting in certain States. For additional information on the Voting Rights Act, as amended, see U.S. Commission on Civil Rights, *Using the Voting Rights Act* (April 1976).

[31] See 122 *Cong. Rec*. E 2059–61 (daily ed., Apr. 14, 1976) (remarks of Congresswoman Yvonne Brathwaite Burke, chairperson, Congressional Black Caucus). See also Dalley interview, *supra* note 24.

[32] For example, the White House supported an amendment to H.R. 12203 that would provide $42 million to foreign governments assisting the United States to curb the flow of narcotics into this country. As of June 4, 1976, H.R. 12203, a foreign assistance and related programs bill, was in the Senate-House conference committee.

[33] See Message of the President to the Congress Outlining Executive Actions and Legislative Proposals, 12 *Weekly Compilation of Presidential Documents* 704–7 (May 3, 1976).

[34] *United States Budget, Fiscal Year 1977, Special Analysis N, Programs for the Reduction of Crime* 243–44 [hereinafter referred to as *1977 Special Analysis N*].

In 1975 President Ford signed into law the Home Mortgage Disclosure Act of 1975[36] which requires banks and savings and loan institutions to keep data on the number and total dollar amount of mortgage loans by census tract or postal zip code.[37] Many blacks hoped that the passage of this act would enable minorities living in the inner cities to acquire mortgage loans more easily by requiring the maintenance of data which would readily reveal whether any banks engage in redlining, i.e., the illegal practice of refusing to make loans in minority areas, or some variation of that practice, such as refusing to make loans to minorities in certain areas.[38]

Although some legislative gains were made by blacks, President Ford vetoed a number of bills which would have had a positive impact upon minorities and poor people. The President, for example, vetoed the school lunch and nutrition bill,[39] the education appropriation bill,[40] and the nurse training bill.[41] All three vetoes, however, were overridden by the Congress.[42]

Another area of major concern to blacks was the lack of adequate job opportunities. According to Department of Labor statistics, black unemployment in July 1976 remained nearly double that of whites. Approximately 13.4 percent of all blacks were unemployed compared to only 7.1 percent of all whites.[43] The unemployment figure for black teenagers was even more discouraging. A staggering 34.1 percent of black teenagers were unemployed. For whites in the same age group, unemployment was only 15.2 percent.[44] President Ford indicated that he would veto a bill for full employment because it "promises more than it can deliver" and would cause inflationary pressures on the economy.[45] Inflation does not need to result from full employment legislation.[46] By 1975 the dollar disparity between incomes of black and whites had increased in recent years and the labor force participation among blacks was declining.[47] This Commission recommended that in the long run, fundamental changes in priorities were necessary to provide economic opportunity for minorities and women. It urged that Congress and the President take action to achieve full employment.[48]

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[35] *Id*.

[36] 12 U.S.C. §§2801–9 (Supp. V, 1975). The Home Mortgage Disclosure Act of 1975 finds that "some depository institutions have sometimes contributed to the decline of certain geographic areas by their failures pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions." §2801(a).

[37] This act is discussed in greater detail in sec. VI(D) *infra* .

[38] A further purpose of the Home Mortgage Disclosure Act was to increase the knowledge and awareness of lending institutions of their own behavior in fulfilling their obligation to serve the housing needs of the communities and neighborhoods in which they are located. See The State of Black America, *supra* note 28. See also remarks of Congressman Rangel, 122 *Cong . Rec* . 2073–75 (daily ed., Apr. 14, 1976).

[39] 42 U.S.C. §1773. The National School Lunch and Child Nutrition Act Amendments of 1975 provides that "the school breakfast program be made available in all schools where it is needed to provide adequate nutrition for children in attendance." Message of the President to the House of Representatives, 11 *Weekly Compilation of Presidential Documents* 1112–13 (Oct. 3, 1975). See also, the President's interview with local (Knoxville, Tenn.) reporters, 11 *Weekly Compilation of Presidential Documents* 1131–32 (Oct. 13, 1975).

[40] The Education Division and Related Agencies Appropriation act of 1976 Pub. L. No. 94–94, 89 Stat. 468 (Sept. 10, 1975). The act makes funds available for schools in federally affected areas that provide programs for the handicapped or offer occupational, vocational, or adult education. It also provides funds for innovative and experimental programs and for higher education programs.

[41] The Nurse Training Act of 1975 Pub. L. No. 94–63, 89 Stat. 354, codified in various sections of 42 U.S.C. §§296–98 (Supp. V. 1975). The act amended Title VIII of the Public Health Service Act to provide support for the training of nurses. See also President's memorandum of disapproval, 11 *Weekly Compilation of Presidential Documents* 11 (Jan. 2, 1975).

[42] These three bills were endorsed by black groups as important for their constituency. See The State of Black America, *supra* note 28. See also Burke remarks, *supra* note 31.

[43] Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* , vol. 23, no. 12., July 1976. The National Urban League disputed Department of Labor statistics and argued that black unemployment might be as high as 25 percent. It noted that Labor Department figures did not count as unemployed those employed part-time but looking for full-time jobs; nor did it count as unemployed those persons who were too discouraged to seek employment. National Urban League, *Quarterly Economic Report on the Black Worker* , December 1975. See also National Commission for Manpower Policy, *The Economic Position of Black Americans: 1976* (July 1976).

[44] *Employment and Earnings* , *supra* note 43. A total of 15.2 percent of all black females were unemployed as compared with 8.2 percent of all white females; 12.9 percent of all black males were unemployed as compared with 6.2 percent of all white males; 37.5 percent of black female teenagers were unemployed, as compared with 15.3 percent of white teenage females; and 30.9 percent of all black male teenagers were unemployed as compared with 15.9 percent of white male teenagers.

[45] See remarks of the President at a fund raising dinner in Los Angeles, 12 *Weekly Compilation of Presidential Documents* 493–96, Mar. 26, 1976.

[46] There were a number of suggestions by economists for creating full employment without inflation. For example, one author asserted that to establish full employment without inflation the President must be empowered to impose wage-price controls as necessary. D. Mills, *Government, Labor, and Inflation: Wage Stabilization in the United States* (1975). Another suggestion was that there needed to be an increase in the labor market's ability to match people with the jobs for which they are qualified. C. Holt, "How Can the Phillips Curve Be Moved to Reduce Both Inflation and Unemployment?" in E.S. Phelps, *et al* ., eds., *Microeconomic Foundations of Employment and Inflation Theory* (1970). See, also M. Ulmer, "The Economic Consequences of Public Employment" in A. Gartner, *et al* ., eds., *Public Service Employment: An Analysis of its History, Problems, and Prospects* (1973). See testimony of Charles L. Schultze, before the Subcomm. on Employment, Poverty, and Migratory Labor of the House Comm. on Labor and Public Welfare, 94th Cong., 2nd Sess., at 148–65 (1976). Changes in legislation to reduce possible inflationary effects are being considered by Congress. 24 *National Journal Reports* 812 (June 12, 1976).

[47] See U.S. Department of Commerce, Bureau of the Census, Consumer Income: "Money Income in 1974 of Families and Persons in the United States," Current Population Reports, Series P–60, no. 101, January 1976, table 13, at 24; and *The Social and Economic Status of the Black Population in*

As of 1976 another area where little positive action had taken place was in housing opportunities for blacks.[49] A sluggish construction industry had been viewed by civil rights groups as depriving minorities and women of opportunities to improve their housing conditions.[50] They perceived that the lack of available housing meant that many blacks, regardless of their financial situation, were unable to purchase housing.

Administration appointments have been of interest to blacks, and at least one Ford administration appointment, that of William T. Coleman as Secretary of Transportation,[51] received the praise of black groups. As of June 1976, Mr. Coleman was the highest ranking black official in the Ford administration. On several other occasions, however, persons were named to positions of responsibility who were not thought by the black community to be well qualified to handle aspects of these positions which would require sensitivity to civil rights issues or issues of special concern to blacks.[52] Under the Ford administration, the White House system for investigating the backgrounds of individuals did not adequately assess whether there had been a history of commitment to civil rights. This appeared to be true even where such commitment would be an essential qualification for the job.[53] The White House, for the most part, did not consult black civil rights organizations or black members in Congress on the selection of individuals for various public offices. Thus, the Congressional Black Caucus took it upon itself to investigate the civil rights records of Presidential nominees for major Federal positions.[54] A program for screening the civil rights records of candidates for high level positions could be appropriately undertaken within the White House by the President's Special Assistants in the Office of Public Liaison.

B. Persons of Spanish Origin

In 1974 the Cabinet Committee on Opportunities for Spanish Speaking People, as a unit of the Executive Office, was an advocate of Hispanic concerns. In addition, one of the top White House officials, Counsellor Anne L. Armstrong, was responsible for advising the President on matters pertaining to persons of Spanish origin. Since 1974 there have been marked changes in the Executive Office structure for responding to the problems of persons of Spanish origin.

First, the Cabinet Committee came to an end on December 16, 1974, when its budget authorization expired.[55] The Cabinet Committee had been created to fill a void in the Federal bureaucracy. It was intended to provide advice to Federal departments and agencies for the development and implementation of comprehensive Federal policies, plans, and programs focusing on Hispanics problems and needs.[56] However, the outlook for the Cabinet Committee had been poor. The Committee had no enforcement power; its Chairman lacked the authority to command the presence of the Cabinet members at meetings; and the Committee had been funded by continuing resolutions for more than a year.[57] Its meetings accomplished little and its annual reports

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the United States, 1974, Current Population Reports, series p-23, no. 54, July 1975, table 9, at 25.

[48] U.S. Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977).

[49] White House housing activities since August 1974 are discussed in detail in sec. VI(D) *infra*.

[50] The Administration promised that 400,000 units of new housing would be constructed by mid-1976 under the Housing and Community Development Act of 1974. By December 1975, approximately 25 percent of these units had been constructed. The National Urban League predicted that under the community block grant program, which replaced urban renewal and model cities programs, no more than 50 percent of the first year grants will benefit low-income persons and that one-third will be used to redevelop high income residential areas. The State of Black America, *supra* note 28.

[51] Dalley interview, *supra* note 24.

[52] President Ford, for example, nominated former Georgia Congressman Benjamin Blackburn to head the Federal Home Loan Bank Board (FHLBB), an agency with a broad range of financial activities. As part of its function, FHLBB is responsible for ensuring against discrimination in mortgage financing. Congressman Blackburn had long opposed legislation that would benefit poor and black people. He voted against Title VIII of the Civil Rights Act of 1968 and the extension of the Voting Rights Act of 1965; Testimony of Congressman Parren J. Mitchell before the Senate Banking Comm. on the nomination of former Georgia Congressman Benjamin Blackburn to head FHLBB, Nov. 11, 1975. The nomination of Mr. Blackburn was subsequently rejected by the Senate. In another case, the administration nominated Nathaniel Davis, former U.S. Ambassador to Chile, to the post of Assistant Secretary of State for African Affairs. He was alleged by black groups to lack sufficient knowledge of the problems confronting the African continent. Letter from the Honorable Charles B. Rangel, former Chairman, Congressional Black Caucus, to the Honorable John T. Sparkman, Chairman, Senate Foreign Relations, Feb. 6, 1975.

[53] Dalley interview, *supra* note 24. See also NAACP resolution, *supra* note 28.

[54] Letter from Charles B. Rangel, for members of the Congressional Black Caucus, to the President, Nov. 18, 1975. Congressman Rangel offered to assist the President in selecting nominees for the Supreme Court vacancy of retired Justice William O. Douglas. His letter urged that the person selected be committed to civil rights and that a black woman be considered for the post.

[55] In 1974 the 93rd Congress failed to pass H.R. 10397, which would have extended the budget authorization for the Cabinet Committee.

[56] 42 U.S.C. §4302 (1970).

[57] For a discussion of the Cabinet Committee's performance, see pt. A, sec. II(B), *supra*

failed to make recommendations for the improvement of conditions facing persons of Spanish origin.

According to the former Special Assistant for Hispanic Affairs, President Ford asked that the Cabinet Committee be given an extension for 6 months beyond December 1974, to give it time to "reform its program".[58] However, Congress did not grant the extensions and the White House left dormant the matter of an Executive Office mechanism to respond to the needs of Hispanic groups.

Second, Ms. Armstrong resigned from her White House post on December 21, 1974, and since that time no Presidential counsellor or other cabinet rank advisor was given such a role with regard to Hispanic Americans. After Ms. Armstrong's resignation, the only White House staff member with regular responsibilities for Hispanic matters was the Special Assistant for Hispanic Affairs, Fernando DeBaca.[59] His appointment marked the first time a special assistant to the President was given full-time duties in this area and, thus, filled a gap which had long existed in the White House office.[60] Credit for creating the position of Special Assistant to the President for Hispanic Affairs, however, goes to the Nixon administration, which created the position and selected Mr. DeBaca. Mr. DeBaca resigned from the White House staff in early-April 1976, and no successor was named until July 1976 when this position was given to Thomas Aranda.[61]

Mr. DeBaca, himself, was not pleased with efforts by Federal agencies or the White House staff to respond to Hispanic problems.[62] Of the White House Office, he told Commission staff that he felt he was carrying the responsibility for "everyone." He criticized the White House Office of Congressional Liaison for failing to pay serious attention to legislation for persons of Spanish origin and stated that the Domestic Council role was not conducive to research on Hispanic problems.[63] He also criticized the Office of Personnel for failing actively to recruit Hispanics for Presidential appointments. Mr. DeBaca made a point of stating, however, that he believed the situation was changing within the White House because the President, had in a staff meeting, provided strong encouragement for increased sensitivity to Hispanic problems.[64]

As a member of the White House Office of Public Liaison, the Special Assistant for Hispanic Affairs was not responsible for proposing policy, and it was seldom that policymakers asked his advice or assistance. Indeed, the function of the Office of Public Liaison was to establish and maintain two-way communication between the White House and constituent groups.[65] The Special Assistant for Hispanic Affairs reported that he was not satisfied to limit his activities to this role. His list of problems which he reported that he tried to get the Ford administration to resolve included the following:

- Hispanics received less than an equitable share of jobs for the unemployed which have been made possible with Federal financial assistance.
- There was a need for more bilingual training in manpower programs.
- The National Institute of Education gave insufficient attention to bilingual education programs.
- There was a need for more men and women of Spanish origin in top-level Federal positions.[66]
- There was a need for an advocacy office in each Federal agency which would be concerned not only

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[58] DeBaca interview, *supra* note 8.

[59] Under the Ford administration, the only high level Executive Office advisor with direct civil rights responsibilities was the Associate Director and Counsel of the Domestic Council, Richard Parsons. Unlike Ms. Armstrong, however, Mr. Parsons' work focused mostly on issues of concern to women and blacks, with little attention to Hispanic problems. Interview with Richard Parsons, Dec. 30, 1975.

[60] Presidents Johnson, Nixon, and Ford have each been aided by a Special Assistant whose responsibility was minority affairs, with a heavy emphasis on matters of concern to blacks.

[61] Mr. Aranda was appointed on July 6, 1976.

[62] Mr. DeBaca's views were detailed in two newspaper articles, which Mr. DeBaca felt accurately represented his statements. DeBaca interview, *supra* note 8. These were: *New York Times*, "Hispanics Allege Insensitivity," at 29, col. 1, Dec. 14, 1975; and *Baltimore Sun*, p. A-16, col. 1, Dec. 11, 1975.

[63] DeBaca interview, *supra* note 8.

[64] *Id*.

[65] Parsons interview, *supra* note 59 and December 1975 Marrs interview, *supra* note 8. The function of the Office of Public Liaison is discussed in sec. I *supra*. Mr. DeBaca stated that he spent 50 percent of his time on travel between January and November 1975 and had attended 38 meetings with Hispanics groups.

[66] In May 1975, only 3.3 percent of the Federal work force was of Spanish origin, as compared with at least 4.5 percent of the total United States population. Moreover, there were only 31 Hispanic supergrades, senior level officials whose salaries ranged from $36,000 to $38,000, of the more than 5,000 supergrades in the Federal Government. (Civil Service Commission, *News* Advance for Newspapers, Apr. 27, 1976). The White House listed 59 high level Hispanic officials but this list includes executive level appointees and other high level officials as well as supergrades. Of this list, more than half were concentrated in the Departments of Health, Education, and Welfare and Justice, the Equal Opportunity Commission, and the Community Services Administration. Only one was from the Department of Defense, which employs almost a million persons, including nearly 1,000 supergrades. None was from the Departments of Agriculture, Commerce, the Interior, Transportation, or the Treasury. (The White House, "Executive Level or Other Top Policy Making Appointees of the Ford Administration as of June 1, 1975" and "Super-Grades and other Major Hispanic Appointees of the Ford Administration as of June 1, 1975.") These five departments together employed well over 1,000 supergrades and none had fewer than 150 supergrade positions. For further discussion of the lack of senior level Hispanics, see *Hearings on Federal Employment of Spanish-Speaking Americans Before the House Comm. on the Judiciary, Subcomm. on Civil and Const. Rights*, 93rd Cong. 2d Sess., ser. 58 (1974).

with Federal employment but also with the allocation of program resources.[67]

While these issues were broad, they did not cover the full spectrum of problems facing Hispanic Americans. Moreover, Mr. DeBaca's influence for resolving them was limited. He stated that he had a meeting with President Ford on most of these issues,[68] but his meeting had not been a formal one. Rather it took place at a White House social event.

From 1974 to 1976, there were some actions to benefit Hispanic Americans throughout the United States. For example, President Ford signed amendments to the Voting Rights Act of 1965, which require States, counties, and towns with sizable Hispanic, Asian American, American Indian, or Alaskan Native population to conduct elections in the language(s) of the protected minority group(s) as well as in English.[69] The new law also expanded the coverage of other protections specifically to Hispanic and other language minorities.[70] According to many Hispanic organizations and leaders, the 1975 Voting Rights Act was the most significant piece of civil rights legislation ever passed on behalf of Hispanic Americans.[71]

The Ford administration also showed initiative, although somewhat limited, in seeking remedies to the special problems of migrant farm workers, many of whom are Hispanics.[72] In the past, migrant farm workers were adversely affected by the illegal and discriminatory practices of farm labor contractors,[73] which remained unchecked.[74] Administration efforts to amend the Farm Labor Contractor Registration Act of 1963, which required farm labor contractors to register with the Department of Labor, were helpful in strengthening the act.[75] Under the 1974 amendments,[76] farm labor contractors were required, for example, to carry increased accident insurance for workers and their possessions; to refrain from requiring workers to purchase goods exclusively from the contractor or another designated person; to pay employees promptly; and to explain job conditions and requirements in an understandable language.

Despite these legislative efforts to curtail employment abuses by farm labor contractors, other issues of concern to Hispanic migrant farm workers received little attention, including problems in such areas as housing,[77] education, health,[78] social welfare, minimum wage coverage unemployment insurance programs,[79] and workers compensation.[80] These problems were handled by a variety of departments and agencies. No one agency on its own can effectively combat the serious problems facing migrant workers. Moreover, because there were few mutually agreed upon objectives and priorities for assisting migrant workers and their families,[81] Federal agencies had not done an effective job together. Therefore, it was incumbent upon the White House to oversee the development of a comprehensive strategy for combating the serious problems facing migrant workers.

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[67] H.J. Res. 959, would establish on Office of Hispanic Affairs in all executive branch agencies to assist in the development and review of all agency actions to assure proper attention to Hispanics. 122 *Cong. Rec.* E2680, 94th Cong., 2d Sess. (May 19, 1976).

[68] DeBaca interview, *supra* note 8.

[69] 42 U.S.C. §§1973aa *et seq.* (Supp. V, 1975). The White House support of this Act is discussed more fully in sec. II(A) *supra*.

[70] 42 U.S.C. §§1973aa–1a(e) (Supp. V, 1975). For an analysis of the coverage of the amendments, see U.S. Commission on Civil Rights, *Using the Voting Rights Act* (April 1976); *Agenda* (monthly newsletter of the National Council of La Raza) at 30–36 (January 1976), and Hunter, The 1975 Voting Rights Act and Language Minorities, 25 *Catholic U.L. Rev.* 250 (1976). See also remarks of President Ford on signing the Voting Rights Act Extension, 11 *Weekly Compilation of Presidential Documents* 837 (Aug. 11, 1975); and 42 U.S.C. §1973a (1975).

[71] January 1976 *Agenda*, *supra* note 70, at 30.

[72] It is difficult to determine the number of migrant workers and the percentage who are of Spanish origin. The Departments of Agriculture, Labor, and Health, Education, and Welfare each had different definitions of the term "migrant." See Division of Migrant Programs, Office of National Programs, Manpower Administration, Department of Labor, *Report on the Department of Labor Farmworker Task Force* 2 and 129 September 1973, and Department of Health, Education, and Welfare, *An Agriculture Continuum: A Descriptive Study of the Farmworker Population and the Settling Out Process* (March 1975).

[73] Farm labor contractors, also called crew leaders, make the work arrangements between farmworkers and farmers. Contractors often recruit, transport, and supervise migrant workers. They also handle pay arrangements and otherwise act as intermediary between the migrant worker and the farmer.

[74] See, *Oversight Hearings on the Farm Labor Contractor Registration Act Before the House Comm. on Education and Labor, Subcomm. on Agricultural Labor*, 94th Cong., 1st Sess., at 12–68, and 133–49 (1976). See also, *Washington Post*, July 2, 1976, at C–7, col. 1, and NAACP v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973).

[75] 7 U.S.C. §2041 *et seq.* (1970).

[76] The Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1656, 7 U.S.C. §§2050a–2050c, 2054, and 2055 and amending 7 U.S.C. §§2041–2053 (Supp. V, 1975).

[77] Traditionally, growers and/or contractors who hire migrants furnish housing. Unfortunately, standards for such housing had not been set at either the Federal or State levels, resulting in the provision of substandard and deplorably unhealthful housing. Hearings Before the Senate Comm. on Labor and Public Welfare, Subcomm. on Migrant Labor, 91st Cong., 2d Sess., pt. 8–A, at 5063 (1970).

[78] Since migrant children move frequently, it has been difficult to keep track of their education and health needs. In fiscal year 1975, the Department of Health, Education, and Welfare developed a computerized Uniform Migrant Student System as a means of maintaining such records.

[79] Farm workers, just as any other category of employees, need insurance against the risk of involuntary unemployment. However, migrant farm workers were excluded from many State and Federal programs for unemployment; old age, survivors, and disability insurance; and social welfare. See Rossi, "The Farmworker and Unemployment Insurance," 3 *Rural Manpower Developments* 16 (Sept.–Oct. 1971).

[80] Farmworkers were largely excluded from workers compensation programs, which were State administered. Under present systems, the Federal Government plays no direct or indirect role in State programs even though migratory farmworkers travel from State to State.

[81] *Report on the Department of Labor Farmworker Task Force* and *An Agricultural Continuum: A Descriptive Study of the Farmworker Population and the Settling Out Process*, *supra* note 72.

Another area of concern to Hispanic Americans was the problem of undocumented persons, sometimes referred to as illegal aliens.[82] The concern arose because Federal and State efforts to curb the entry and subsequent employment of undocumented persons was sometimes misdirected at Hispanic United States citizens and registered aliens.[83] Although exact figures were not available, the Immigration and Naturalization Service (INS) of the Department of Justice estimated that as many as 12 million illegal aliens, who for the most part were in search of employment, entered the United States in fiscal year 1975.[84] In that year unemployment was at its highest[85] and many viewed the potential employment of undocumented persons as a curb on the employment opportunities for citizens and aliens with permission to work.[86]

President Ford expressed great concern over the increasing number of undocumented persons entering the United States. Pursuant to his instructions, in early 1975 the Domestic Council Committee on Illegal Aliens was established to study the problem and recommend programs for its remedy.[87] The committee held three or four meetings in 1975, most of which were attended by staff of the member agencies and one of which was attended by the Cabinet members.[88] The committee's efforts temporarily ceased in late 1975 due to staff problems. A meeting was held in early 1976 "to initiate the whole effort again."[89] As of March 1976, the committee's chief effort had been to gather information.[90]

Specifically, its assignment was to determine what Federal resources could be utilized to: 1) implement broader security methods to stop the flow of undocumented persons; 2) assess the impact of the undocumented persons' presence in such areas as unemployment, welfare, and social services; and 3) count the number of undocumented persons already in this country.[91] There needed to be high level attention to other issues pertaining to undocumented persons, however. For example, the committee should have examined the extent to which Federal enforcement efforts created problems for Hispanic United States citizens and resident aliens. Federal enforcement officials often did not make the effort to distinguish between illegal aliens, resident Hispanic aliens, and U.S. Hispanic American citizens. Indeed, the INS had been charged with harassment of Hispanic citizens and found guilty of violating fourth amendment rights of Hispanics by unreasonable search and seizure procedures.[92] Moreover, immigration and naturalization laws were unevenly enforced, being primarily focused on visably identifiable minorities rather than on caucasians from Canada or Europe.[93]

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[82] Undocumented persons are persons who have entered the United States unlawfully, or who, after legal entry, have violated the terms of their admission, generally, by overstaying their visas or accepting unauthorized employment. The basic United States law governing immigration and naturalization is contained in the Immigration and Nationality Act, as amended, 8 U.S.C. §1101 *et seq*. (Supp. V, 1975). Under the act, any alien who enters the United States without examination or through misrepresentation or fraud is guilty of a misdemeanor punishable by up to 6 months' imprisonment and/or a $500 fine for the first offense, with harsher fines and longer imprisonment for subsequent violations.

[83] Problems such efforts have created for Hispanic citizens and resident aliens are discussed in notes 92 and 93 *infra*.

[84] *Hearings on H.R. 982 and Related Bills (Illegal Aliens) Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 8, testimony of Leonard F. Chapman, Jr., Commissioner, Immigration and Nationalization Service, Department of Justice, at 36 (1975) [hereinafter referred to as *Hearings on H.R. 982*]. Due to their covert status, illegal aliens are subject to mistreatment by employers and others who seek to exploit their illegal status for personal profit. *Id*.

[85] Unemployment reached a peak of 9.2 percent in May 1975. Department of Labor, 21 *Employment and Earnings* 5 (June 1975).

[86] There have been a number of Congressional proposals to curtail the employment of undocumented persons, but as of July 1976 none had reached the White House for the President's signature. The possible discriminatory effects of such proposals are discussed in note 94 *infra*.

[87] 11 *Weekly Compilation of Presidential Documents* 26 (Jan. 13, 1975). The Attorney General was designated to chair the committee, which consisted of the Secretaries of State, the Treasury, Agriculture, Commerce, Labor, and Health, Education, and Welfare; Assistant to the President Baroody; and the Director of the Office of Management and Budget.

[88] Interview with F. Lynn May, Associate Director for Housing and Community Affairs, the Domestic Council, Mar. 2, 1976.

[89] *Id*.

[90] *Id*. At that time, it had not submitted any recommendations to the President. However, in January 1977, the Committee released the results of its study. The report is entitled, *Domestic Council Committee Preliminary Report on Illegal Aliens*.

[91] Telephone interview with F. Lynn May, Assistant Director, the Domestic Council, Jan. 12, 1976.

[92] According to Hispanic leaders, there were many incidents of Hispanic citizen harassment by INS officials. Interview with Raul Yzaguire, national director, National Council of La Raza, Jan. 13, 1976. See also, Mazon, "Illegal Alien Surrogates," 6 *Aztlan* 305 (1975); letter from Henry Forner, president, Joint Board, Fur, Leather & Machine Workers Union, to the *New York Times*, Jan. 2, 1975, at 36, col. 1; *Agenda*, *supra* note 70, Mar. 1975, at 2, June 1975, at 1-2, Sept. 1975, at 1 and 4, and Feb. 1976, at 4; Hayden, the INS and Civil Liberties: A Report on the Abuse of Discretion, 40-41 *ACLU Report* July 1974.

In three separate decisions, the Supreme Court found that certain INS enforcement activities had violated the fourth amendment guarantees of Hispanics. Alemeida-Sanchez v. United States, 431 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975).

[93] Because of identifiable physical and ethnic characteristics, Hispanic and Asian Americans will more often be suspected of being illegal aliens than will majority group members. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the only reason given by INS for detaining the plaintiff was that the plaintiff appeared to be of Mexican ancestry. The court prohibited INS using physical appearance as the sole grounds for detaining anyone. *Id*. at 885-87. See also, Berman, "Harassing Aliens: Roundup in the Barrio," *2-3 ACLU Newsletter November 1973*; *Hearings on the Bureau of Customs Border*

Similarly, the Government must determine how to prevent decreased Hispanic or Asian American employment in response to employers' concern over the issue of undocumented persons. This is necessary because major U.S. employers were reportedly taking steps to guard against the employment of undocumented persons, and in the absence of any Federal statute or guideline to the contrary were likely to rely on physical appearance or surname as a basis for denying Hispanics and Asian Americans employment.[94]

Another area of importance to Hispanics was bilingual education.[95] Since passage of the Bilingual Education Act of 1968,[96] it had been the policy of the United States to provide for the special educational needs of language minority children through programs administered by Federal agencies. These programs greatly contributed to equal educational opportunities for language minority children throughout the United States.[97] However, there was major controversy between the President and Congress concerning the level of Federal funding for bilingual education. Congress criticized efforts of the executive branch as inadequate and appropriated more money than was requested by the President.[98] The administration's view was that bilingual education demonstration programs should be diminished at the Federal level to allow States to assume direct control over bilingual programs.[99]

It seemed unlikely, however, that State and local governments on their own initiative would provide adequate bilingual programs. Indeed, State and local governments were reluctant to implement such programs. The State of California, for example, had not fully implemented a statewide bilingual program. In a major review of the State's effort to provide its approximately 223,000 language minority children with bilingual education, the California Advisory Committee to this Commission found that the California State Department of Education failed to ensure equal educational opportunities to these students.[100] Similar problems also arose in Michigan,[101] Texas,[102] and Arizona.[103]

Inspection Procedures Before the Subcomm. on the Treasury, Postal Service, and General Government Appropriations of the House Comm., on Appropriations for 1973 , 92d Cong. 2d Sess., pt. 5 (1972); and *Hearings on Treasury Department Before the Subcomm. on Treasury, Postal Service, and General Government Appropriations of the House Comm., on Appropriations for 1973* , 92d Cong., 2d Sess., pt. 1 (1972).

[94] See, *New York Times* , Apr. 11, 1976. Two major proposals, which would amend the Immigration and Nationality Act to prohibit the employment of illegal aliens, were under consideration by the Congress. One would set up procedures which would penalize employers who knowingly hired illegal aliens and would place the burden of such discovery on the employer. The bill also contained a limited amnesty provision for all illegal aliens who have resided in the United States for at least 8 years and would prohibit national origin discrimination in employment. H.R. 8713, 94th Cong., 1st Sess. (1975). The Commission opposed H.R. 8713 as it was written in mid-1975 as having a possible discriminatory effect on minority job seekers, whether citizens or aliens authorized to work in this country. Since the burden of ensuring that illegal aliens are not employed would be placed on the employer, this might result in employers' refusing to hire national origin minorities with a legal right to work as a precautionary measure against hiring illegal aliens. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, July 28, 1975; and letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to Don Edwards, Aug. 28, 1975. A second bill proposed similar measures with respect to the employment of illegal aliens but would not place as heavy a burden on employers. S. 3074, 94th Cong. 2d Sess. (1976). See also, *Amending the Immigration and Nationality Act* , H.R. Rep. No. 94-506, 94th Cong. 1st Sess. (1975); and Hearings on H.R. 982, *supra* note 84.

[95] Generally, bilingual/bicultural education is instruction using the native language and culture as a basis for learning academic subjects until secondary language skills have been developed sufficiently. It is the most widely discussed of various approaches to providing language minority children with equal educational opportunity. For a more detailed discussion of State and Federal bilingual/bicultural programs, see U.S. Commission on Civil Rights: *A Better Chance to Learn: Bilingual-Bicultural Education* , May 1975 [hereinafter referred to as the *Bilingual Education* report].

[96] 20 U.S.C. §880 *et seq* . (1970), as amended, (Supp. V, 1975). The act was amended in 1972 and 1974.

[97] *Bilingual Education* report, *supra* note 95 at 137-141.

[98] See, e.g., *Hearings on Education Division and Related Agencies Appropriation Fiscal Year 1976 Before the Senate Comm. on Appropriations, Subcomm. on Departments of Labor and Health, Education, and Welfare and Related Agencies* , 94th Cong., 1st Sess. (1975) [hereinafter referred to as *Hearings on Education Division and Related Agencies*]. See also, Senate and House Hearings, *supra* note 25. On June 23, 1976, the House passed the final version of the bilingual education appropriation as part of H.R. 14232, funding for the Department of Health, Education, and Welfare. As of July 10, 1976, Senate and House differences in HEW's appropriation bill were being resolved. H.R. 14232 provides an appropriation of $115 million for bilingual education or $25 million more than had been requested by the President. H.R. 14232, 94th Cong., 2d Sess., 122 *Cong. Rec*. (1976). In the area of training of bilingual teachers, the Federal administration budget requests have also been small. Commenting on the congressional increases over President Ford's requests for bilingual teacher training, Senator Warren G. Magnuson said, "There would not be one-twentieth of the teachers in bilingual education if the Senate Appropriations Committee has not insisted on this year after year." *Hearings on Education Division and Related Agencies* , *supra* note 98, at 18.

[99] See, e.g., *Hearings on Education Division and Related Agencies* , *supra* note 98, at 17-18, 109-27. See also, *Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1976, Before the House Comm. on Appropriations, Subcomm. on the Departments of Labor and Health, Education, and Welfare* , 94th Cong., 1st Sess., pt. 1, at 69.

[100] California Advisory Commitee to the U.S. Commission on Civil Rights, *State Administration of Bilingual Education—Si O No*? (June 1976.) See also Lau v. Nichols, (414 U.S. 563 (1974). Lau upholds HEW regulations requiring school districts to implement programs which address the needs of non-English speaking children.

[101] This failure to provide adequate bilingual education programs may have, in some cases, been due to severe strains on State and local government finances due to recession and high unemployment. In New York City, for example, Hispanic bilingual teachers were adversely affected by the financial crisis there. The reduction in Federal, State, and city funds resulted in the curtailment of bilingual education programs and the disproportionate reduction of Hispanic teachers. *New York Times* , Mar. 2, 1975 at 85, col. 1; Aug. 31, 1975, at 79, col. 1; Sept. 14, 1975, at 38, col. 3; Dec. 21, 1975, at 39, col. 1; Feb. 8, 1976, at 36, col. 3; Feb. 22, 1976, at 55, col. 5; Mar. 26, 1976, at 33, col. 1.

[102] The Michigan bilingual education program began only recently. One State senator blamed the State Department of Education for thwarting the States' full compliance with the Michigan law. 14 *Integrated Education* 52 (May-June 1976). The Mid-West Council of LaRaza has accused Midwestern States, in general, of being little interested in bilingual programs.

C. Asian and Pacific Americans

A number of officials within the Office of Public Liaison engaged in activities pertaining to Asian Americans. For example, the former Special Assistant to the President for Human Resources, Theodore Marrs, held a conference on bilingual education, and one of the expressed purposes of the conference was to increase awareness by Asian Americans of what federally funded bilingual programs have to offer.[104] The Special Assistants for Minority Affairs and Ethnic Affairs met with Asian American groups that wanted to direct White House attention to some of the problems their constituents face.[105] This White House staff advocacy role with regard to Asian Americans was attempted for the first time under the Ford administration.[106]

While White House staff were personally helpful to Asian American groups on specific issues,[107] no one in the White House worked with the concerns of Asian Americans as more than a part-time assignment, and thus Asian American interests were treated secondarily. Moreover, the dispersal of oversight for Asian American matters among a number of White House staff meant that no one person had ultimate responsibility in this area and Asian Americans were not always certain whom they should approach.

One positive action was President Ford's rescission of Executive Order No. 9066[108] on February 19, 1976. This order, which resulted in the internment of 110,000 Japanese aliens[109] and citizens during World War II, ceased to be in effect after the war but was never formally rescinded until 1976.[110] The rescission was of great symbolic importance, especially to Japanese Americans.

The White House did not play an active role in identifying and resolving problems of Asian Americans, but rather it was reactive to issues brought to it by Asian Americans groups. As a result these groups felt that if anything was to be accomplished, they

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Quarterly Report; Summary Report of Mid-West Council Activities January 10, 1976 to May 1, 1976 at 6 (May 1976).

[103] Although the State of Texas was attempting to implement bilingual education programs, there were problems of an administrative nature. See e.g., J. Cardenas, "Bilingual Education v. Segregation," 5-6 *Intercultural Development Research Association Newsletter* (October 1975).

[104] 1975 Marrs interview, *supra* note 8.

[105] For example, as of July 1976, the Special Assistant for Minority Affairs had met with the Asian and Pacific American Federal Employees Council, a group of Federal employees established to increase Federal agency responsiveness to the needs of Asian and Pacific Americans. The Special Assistant for Minority Affairs had met with the Japanese American Citizens League (JACL), the largest single ethnic Asian American organization in the Nation, which has approximately 100 chapters across the country. JACL operates an information and education program and monitors proposed legislation which may have an effect on the welfare of Japanese Americans. The Special Assistant for Human Resources had met with the Pacific Asian Coalition, a group established to secure and improve social service for Asian and Pacific Americans. The Pacific Asian Coalition represents, through regional committees, people who work for these goals at the local level.

[106] See pt. A, sec. II(C), for a discussion of White House staff activities from 1973 to 1974 pertaining to Asian Americans.

[107] The White House also prepared messages and greetings from the President for events for the Japanese American Citizens League. Telephone interview with Wayne K. Horiuchi, Washington representative, Japanese American Citizens League, Aug. 3, 1976.

[108] Exec. Order No. 9066, 3 C.F.R. 1938-1943 Comp., p. 1092, provided the authority to remove Japanese aliens and citizens from the West Coast, ostensibly as a security measure during World War II, when this country was at war with Japan. It resulted in the evacuation of 110,000 persons of Japanese ancestry from their homes, their internment in special camps, and subsequent relocation. As one Japanese American writer described the conditions of those interned, they were "inmates of cramped, crowded American-style concentration camps, under armed guards, fed like prisoners in mess hall lines, deprived of privacy and dignity, shorn of all their rights." B. Hosokawa, *Nisei , The Quiet Americans* 329 (1969). For a detailed discussion of the internment, see M. Weglyn, *Years of Infamy, The Untold Story of America's Concentration Camps* (1976).

[109] Many Japanese living in this country were aliens, not by choice, but because of restrictions on citizenship for Japanese immigrants. See 111 *Cong. Rec.* 23557 (Sept. 20, 1965).

[110] The President's remarks upon signing the proclamation concerning Japanese American internment during World War II, 12 *Weekly Compilation of Presidential Documents* 245 (Feb. 23, 1976).

themselves must outline key issues for White House staff consideration.[111]

One interest Asian American groups expressed to White House staff was the appointment of Asian Americans to advisory committees. While Asian Americans comprise over 1.2 percent of the membership on Federal advisory committees,[112] Asian American groups were concerned because several advisory committees which were of great interest to Asian Americans lacked any Asian American representation. For example, in May 1975 President Ford announced the appointment of a committee to advise him on the resettlement of refugees from Southeast Asia.[113] The committee had 17 members,[114] but none were refugees or even Asian or Pacific Island Americans. Similarly, the Bureau of the Census had a number of advisory committees, including committees specifically established to consider the problems of counting minority Americans.[115] Until mid-1976 none of these committees adequately represented the interests of Asian Americans.

In response to concern expressed by the Asian and Pacific American Federal Employee Council, the White House asked the Council to develop a list of advisory committees which should but did not have Asian American members. Asian American groups did not have direct access to the kind of information required to fulfill the White House request. They did not even have, for example, nor did the White House supply them with, a list of all the Federal advisory committees that currently exist.[116] Moreover, they did not have immediate access to the resources available to OMB,[117] which were necessary for acquiring the information.[118]

Another key issue was the inadequacy of census procedures. Although the White House staff were supportive on this issue, Asian and Pacific Americans who tried to make their views known felt frustrated in their attempts. In March 1976, 21 Asian and Pacific Island Americans from across the Nation were invited to meet with the Bureau of the Census.[119] The participants believed they had received an invitation to communicate their views on substantive matters relating to census issues. They found, however, that the sole purpose of the meeting as viewed by the Bureau was "to provide the participants with an orientation for proper consideration of the 'communications system' topic by the participants."[120]

Later, the Asian and Pacific American Federal Employee Council asked the Special Assistant for Minority Affairs to support Asian groups in its pursuit of improved Bureau of the Census procedures. The Special Assistant, in turn, requested a list of deficiencies and recommendations. The Council prepared a document which was as exhaustive as its volunteer resources would permit.[121] The Special Assistant did not review or evaluate this document to determine its merit. Despite the fact that issues in the document had been presented earlier to the Bureau of the Census and the Bureau had declined to act on them, he merely forwarded it to the Bureau of the Census for comment.

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[111] See, for example, letters outlining key issues from Wayne K. Horiuchi, Washington representative, Japanese American Citizens League, to John Calhoun, Special Assistant for Minority Affairs, the White House, June 18, 1976; letter from Mary I. Wantabe, Mid-Atlantic Regional chairperson, Pacific Asian Coalition, and Marshall Jung, Mid-Atlantic Regional chairperson, Asian American Research Center, to John Calhoun, June 16, 1976; and letter from Franklin Fung Chow, chairperson, Asian and Pacific American Federal Employee Council to Mr. Calhoun, Apr. 21, 1976.

[112] Office of Management and Budget, *Fourth Annual Report on Federal Advisory Committees*, covering calendar year 1975.

[113] Exec. Order No. 11860, 3A C.F.R. 162 (Supp. 1975). See also remarks of the President upon signing Exec. Order No. 11860, establishing the Committee on Refugees from Southeast Asia, 12 *Weekly Compilation of Presidential Documents* 531 (May 26, 1976).

[114] These included the mayor of San Francisco, the president of a major labor union, a singer, the president of the American Medical Association, several businessmen, and the national youth president of the March of Dimes. 11 *Weekly Compilation of Presidential Documents* 533 (May 19, 1975).

[115] In the 1970 census, the Bureau drew upon a variety of advisory committees, such as the Census Advisory Committee of the American Statistical Association and the Census Advisory Committee on Population Statistics. After the 1970 census, it also established committees on Native Americans, blacks, and persons of Spanish origin.

[116] Later this list was supplied the Council by OMB. After much effort, the Asian and Pacific Federal Employee Council prepared a list of advisory committees which it believed was of special interest to Asian Americans. The White House, rather than responding that it would make use of the information to monitor Federal agency actions, requested resumes for the Council from persons it would like to see serving on these committees. Telephone interview with Larry Kubota, chairperson, Issues Committee, Asian and Pacific American Federal Employee Council, Aug. 3, 1976.

[117] Under the authority of Federal Advisory Committee Act and Executive Order 11769, OMB conducts an annual review of each Federal advisory committee to determine whether it is carrying out its purpose and whether its continued existence is necessary. One specific area of inquiry concerned the Federal agency's actions to achieve "balance in the membership of the committee" given the functions to be performed and the points of view to be represented. OMB, Circular No. A-63, Transmittal Memorandum No. 3, Sept. 3, 1975.

[118] On July 16, 1976, the Bureau of the Census established an Asian and Pacific Americans advisory committee for the 1980 census. See Press Release No. 76-60, Congressman Spark M. Matsunaga (undated).

[119] Letter from Vincent P. Barabba, Director, Bureau of the Census, Department of Commerce, to Tania Azores, chairperson, Philippine Americans for Community Action and Development, Apr. 18, 1976.

[120] See letter from Tania Azores to Vincent P. Barabba, Director, Bureau of the Census, Department of Commerce, Mar. 19, 1976, and letter from Antonio A. Grafilo, executive director, Pilipino Organizing Committee, to Vincent P. Barabba (undated copy).

[121] Among the recommendations made by the Asian and Pacific American Federal Employee Council were: use of indigenous census enumerators in local Asian American communities, use of ethnic newspapers and magazines to emphasize the importance of a complete enumeration of Asian Americans, use of bilingual questionnaires or at least bilingual instructions, use of the term "Asian and Pacific Islanders" with a listing of subgroups, and increased research to improve the accuracy of census procedures for counting Asian Americans. Chow letter, *supra* note 111.

D. Native Americans

In August 1974, the basic structure for handling White House responsibilities for Native Americans, the National Council on Indian Opportunity (NCIO), had just been phased out.[122] While NCIO had not been an influential mechanism in its final years,[123] it served as an advocate for Native American interests and made some important recommendations.[124] Plans were being formulated for a Domestic Council Committee on Indian Affairs, which was to be a mechanism to review policy that affected more than one agency.

However, in April 1976 a White House staff member stated that the White House had requested OMB to prepare a paper[125] analyzing options for the President to consider in deciding how best to replace NCIO.[126] In mid-1976, the committee had not been established, and there was no replacement for NICO.

Since August 1974, some White House staff assumed the role of advocates for Native Americans. The Special Assistant for Human Resources asserted that this function consumed the greatest amount of the approximately 5 hours he spent each day on minority affairs. His work in 1975 included about 60 trips to Indian reservations.[127] He stated that he had assumed this function voluntarily and that it had not been assigned to him.[128] Associate Counsel Kilberg also spent from 5 to 10 percent of her time on matters relating to Native Americans.[129] Her principal activity in 1975 pertaining to Native Americans was to work with Dr. Marrs to bring peace to the Pine Ridge Reservation.[130] A special assistant for American Indian Affairs was appointed in August. 1976.[131]

White House staff reported a number of accomplishments with regard to Native Americans.[132] These included: providing the impetus for joint cooperation by 19 Pueblo groups in funding a cultural center on land owned by all 19 groups;[133] persuading the Department of Justice to establish an Indian Resources Division in the Office of the Assistant Attorney General for Land and Natural Resources;[134] making recommendations to the Indian desk at the Department of Commerce for increased effort by the Department to secure business assistance for Native Americans;[135] assisting in the return of a large number of acres belonging to Native American tribes and people;[136] and supporting a bill providing for the authorization of $1.4 billion to be used for Native American health care over a period of 7 years.[137]

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[122] NCIO was phased out in late June 1974. For a further discussion of White House activities with regard to Native Americans prior to August 1974, see pt. A, sec. II(D) *supra*.

[123] Indeed, representatives from NCIO often could not command sufficient attention from Federal agencies even at the assistant secretary level. 1975 Kilberg interview, *supra* note 4.

[124] Work performed by NCIO laid the groundwork for the 1970 message by President Nixon discussed *infra* this section.

[125] According to the Special Assistant for Human Resources, it was unusual for the White House to request an option paper from OMB. He stated that most option papers originated within OMB. Interview with Theodore Marrs, Special Assistant to the President for Human Resources, the White House, Apr. 13, 1976.

[126] According to the Special Assistant for Human Resources, the options being considered were to:
(1) Establish a Domestic Council Committee on Native Americans;
(2) Set up, as part of the White House staff, a 40 or 50 person office;
(3) Establish a small office in the White House utilizing Indian desks in Federal agencies. As additional staff resources, there would also be an advisory group consisting of representatives from the Tribal Chairmens' Association and other major Native American organizations;
(4) Establish no focal point. 1973 Marrs interview, *supra* note 125.

[127] 1975 Marrs interview, *supra* note 8.

[128] His basic duties related to human resources, including such topics as nutrition, adult education, health care, persons missing in action, and nursing homes.

[129] 1975 Kilberg interview, *supra* note 4.

[130] Social, political and economic conditions on the Oglala Sioux Reservation in Pine Ridge, South Dakota, were deteriorating, and thus the Commissioner of Indian Affairs recommended that the Secretary of the Interior appoint a Secretarial Commission to study the problems and to make recommendations regarding the situation at the Pine Ridge Reservation. A discussion of the findings of this study can be found in the U.S. Commission on Civil Rights, *Civil Rights Digest*, vol. 7, no. 4 (Summer 1975). Other accounts of the situation at Pine Ridge may be found in the Indian newspapers *Wassaja*, San Francisco, Calif., and *Akwesasne Notes*, Mohawk Nation, Rooseveltown, N.Y. The Commission on Civil Rights released a report, *Report of Investigation: Oglala Sioux Tribe, General Election, 1974*, concerning alleged irregularities that took place before, during, and after the election. For further information about Pine Ridge see note 149 *infra* and pt. A, sec. II(D) *supra*.

[131] The appointment of Bradley H. Patterson, Jr. is discussed in note 17 *supra*.

[132] 1975 and 1976 Marrs interviews, *supra* notes 8, 125 and 1975 Kilberg interview, *supra* note 4.

[133] The center was to contain a museum and craft shop and would have, according to the Special Assistant for Human Resources, "The first restaurant in the country serving American Indian food." As of December 1975, the Special Assistant was trying to help the tribes find a curator for the museum. 1975 Marrs interview, *supra* note 8. The All Indian Pueblo Council of the 19 Pueblo Tribes expressed great enthusiasm about the cultural center, characterizing it as "one of the projects which has been most useful." The Chairman of the Council praised Dr. Marrs' efforts, stating that Dr. Marrs had been helpful in cutting red tape, "worked behind the scenes" to assist the Pueblo people, kept the Pueblo people informed of administration views, and advised the administration of Pueblo needs and desires. Telephone interview with Del Lovato, Chairman, All Indian Pueblo Council, Aug. 9, 1976.

[134] This Division, established by a reorganization internal to the Department of Labor in May 1975, was responsible for assisting Native Americans in suits they are filing against third parties.

[135] 1976 Marrs interview, *supra* note 125.

[136] 1975 and 1976 Marrs interviews, *supra* notes 8, 125 and 1975 Kilberg interview, *supra* note 4.

[137] Senate bill 522, entitled the Indian Health Care Improvement Act, was passed on July 30, 1976. As of Aug. 3, 1976, it had not been sent to President Ford for his signature.

In August 1974, the policy of the executive branch with regard to Native Americans was governed by a 1970 message from President Nixon supporting self-determination.[138] President Ford endorsed that policy.[139] The message included four goals: (1) encouragement of then-pending legislation to return Blue Lake to the Taos Pueblo people, (2) provision for the right of Indian communities to control and generate Federal programs, (3) the development of an Indian Trust Council, and (4) a rejection of the forced termination policy of the Federal Government. The first of these was accomplished in December 1970 by an act of Congress.[140] The Indian Self-Determination Act,[141] signed by President Ford on January 4, 1975, was a step toward the second goal. It directs the Secretaries of the Interior and Health, Education, and Welfare to enter into contracts with tribal organizations to "plan, conduct, and administer" programs which the Secretaries were authorized to administer.[142]

As of mid-1976, there had been little progress in fulfilling the remaining goals. No trust council had been established. House Concurrent Resolution 108 of the 83rd Congress, which declared termination to be the long-range goal of Indian policy, had not been repealed.[143]

Moreover, the relationship between Native American peoples and the Federal Government continued to be fraught with problems, including a) conflicts between the Federal responsibility to act as a protector of Indian lands and its interest in gaining access to the natural resources which are under Native American ownership, and b) paternalism in the Federal Government's treatment of Native Americans.

A draft policy paper on Indian-Federal relationships[144] was written to advise the President concerning Federal Native American trust responsibilities.[145] It was significant that the paper focused on deploring the social and economic conditions of Native Americans[146] rather than on making recommendations for resolving the salient problems of conflict of interest and paternalism. Indeed, these issues were not even mentioned.

There were no White House actions to diminish significantly the conflict between the Federal responsibility to act as a protector of Indian lands and its interest in gaining access to the valuable resources those land contain. The Department of the Interior, which is responsible for the conservation and development of natural resources, continues also to be the major Federal agency to administer the trust responsibilities for millions of acres, containing valuable resources, which belong to Indian tribes.[147]

Paternalism combined with an apparent personal lack of confidence in Natives Americans' abilities to manage their own affairs was very evident in descriptions offered by the Special Assistant for Human Resources of his activities. For example,[148] he stated that in late 1975 representatives of the Oglala Sioux Tribe "demanded" to see the President, but the White House refused because it could not acquiesce to "demands".[149] Similarly, the Special

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[138] For a further discussion of President Nixon's 1970 message, see pt. A, sec. II(D) *supra* .

[139] 1975 Kilberg interview, *supra* note 4, and President's meeting with 200 American Indian leaders from across the country, July 16, 1976 (12 *Presidential Documents* 1171 (July 26, 1976)). This speech may have been the first time an American President received all of the American Indian leaders. Statement by R. Dennis Ickes, Deputy Under Secretary of the Interior, Navajo Education Seminar, Window Rock, Ariz., Aug. 2, 1976. The leaders were asked to come in native dress, leading to the suspicion that one purpose of the meeting was to add color to the bicentennial celebrations which were going on at the time.

[140] The return of Blue Lake is discussed in pt. A, sec. II(D) *supra* .

[141] Indian Self Determination Act, Pub. L. 93-638, 88 Stat. 2206 (codified in 5 U.S.C. §3371, 25 U.S.C. §§450f-45n, 42 U.S.C. §§2004b, 4762 (Supp. V, 1975).

[142] 25 U.S.C. §450f (Supp. V, (1975). Regulations implementing the act were issued by the Departments of the Interior and Health, Education, and Welfare respectively in November 1975. 25 C.F.R. §271 (1976) and 42 C.F.R. §3-4.60 (1976).

[143] This resolution is discussed in pt. A, sec. II(D), note 118 *supra* .

[144] White House working paper, untitled, supplied to Commission staff by Dr. Theodore Marrs in December 1975.

[145] 1975 Marrs interview, *supra* note 8.

[146] The paper noted, for example, that in 1970, 40 percent of Native American families had incomes below the poverty level, as opposed to 13.7 percent of all families in this country. It stated that in 1970, only one-third of all 25 year-old Native Americans had finished high school, and in some areas, the figures for education level were even more dramatic. For example, Native Americans on the Navajo Reservation had a median of only 4.1 school years. Twenty eight percent of all Native Americans lived in homes which did not have complete plumbing, as compared with 8 percent of all people in this country. White House working paper, *supra* note 144.

[147] Several of the task forces of the American Indian Policy Review Commission (AIPRC) recommended the establishment of an independent agency to handle Native American matters. American Indian Policy Review Commission, *Interim Report* (1976). AIPRC was established by Congress in mid-1975 to investigate Federal management of Indian affairs. See also J. Anderson and L. Whitten, "Bungling Indian Affairs," *Washington Post* , July 19, 1976, at C-23, col. 7.

[148] Another example was reflected in Dr. Marrs' statement that he meets and corresponds with hundreds of Indian people a month because "listening has a medicinal value." He was thus indicating that he believed that the mere fact of White House listening to statements from Native Americans with regard to needs was important, whether or not any results ensue.

[149] The Special Assistant stated that there was an impending election at the Pine Ridge Reservation and the group that requested to see the President represented one candidate. Thus, the Special Assistant said, one reason for the initial refusal to set up a meeting with the President was that it would not have been appropriate to give "excessive attention" to any one of the candidates. As a result of this refusal, the group later asked to meet with the Special Assistant, who agreed to the meeting and also asked Department of Justice representatives to be present. Because the group "adjusted its demands," he also arranged for the President to join the meeting briefly.

Assistant, who claimed credit for helping the Choctaw Tribe[150] set up a trust fund, stated that the purpose of the trust fund[151] was to ensure that the money would not be "frittered away," implying that his intervention was essential to ensure that the Choctaw Tribe managed its money properly.[152]

E. Women

Under the Nixon administration White House Staff included an Office of Women's Programs with a staff of two. The office reported to Presidential Counsellor Anne Armstrong, who also had duties pertaining to women. In mid-1976 two White House program staff members handled day-to-day responsibilities for public liaison with feminist leaders and groups, other women's groups, and female members of Congress. After Ms. Armstrong resigned, on December 21, 1974, however, although there was no female counsellor to the President and no counsellor assumed Ms. Armstrong's responsibility for women, President Ford appointed a Special Assistant for Women to assure full-time responsibility for women concerns.[153]

The President signed legislation to protect the rights of women in a number of areas.[154] In addition, the Government was confronted with a number of issues concerning women, such as reproductive choice, child care centers, education, health care, funding of the National Commission on the Observance of International Women's Year, the Equal Rights Amendment, rape, social security, seniority, admission of women to service academies, pension benefits, athletics, and sex discrimination in employment—especially in higher education.

The Ford administration took a number of positive actions with regard to women. For example, the President had on several occasions expressed support for ratification of the equal rights amendment.[155] In addition, President Ford established a National Commission on the Observance of International Women's Year 1975 to "focus attention on the need to encourage appropriate and relevant cooperative activity in the field of women's rights and responsibilities."[156] He also directed the Justice Department "to develop in consultation with other affected Federal agencies a plan to review the entire United States Code. . .to determine the need for revising sex-based provisions that are not justified in law nor supported by wise policy."[157] In addition, President Ford encouraged Governors of all States to initiate a similar review. The President also signed a bill extending the life of the Commission for the purpose of recognizing and convening a National Women's Conference to be preceded by 56 State and territorial conferences.[158] These conferences will "assess progress toward insuring equality for all women and. . .set goals for eliminating barriers toward their full and equal participation in American life."[159] The President suggested that the conference members look at the problem of the "widening earnings gap between men and women."[160] He further stated that this issue would become a matter of priority for his administration.

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[150] The Choctaws, whose principal location is their reservation in Oklahoma, were once an independent Indian republic. With the Chickasaws, Cherokees, Creeks, and Seminoles, the Choctaws were part of the Five Civilized Tribes and had their own legislative, educational, and judicial systems. After the opening of the Indian Territory (Oklahoma) to white settlers, the Choctaws' institutions declined under pressure of new laws, many designed to secure Indian land for white settlement. The Choctaws are under the jurisdiction of the Bureau of Indian of Indian Affairs. Angi Debo, *And Still the Waters Run, the Betrayal of the Five Civilized Tribes* (1972).

[151] The fund was established for money received by the Choctaw tribe when the Supreme Court ruled that it owned land on the Arkansas River bed. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

[152] 1975 Marrs interview, *supra* note 8.

[153] This was Patricia Lindh, and after her resignation, Jeanne Holm. See note 15 *supra*.

[154] The White House reported that President Ford supported and signed the following legislation:
The Housing and Community Development Act of 1974, which prohibits discrimination on the basis of sex in housing and mortagage credit lending.
The Equal Credit Opportunity Act of 1974, which prohibits discrimination on the basis of sex and marital status in the granting of consumer credit. The Federal Reserve published regulations to ensure enforcement of equal credit opportunities in October 1975.
The Women's Educational Equity Act of the Education Amendments of 1974, which provides funds for the development of curricula and textbooks to advance equality in education.
The Military Procurement Bill of 1975, which provided for the admission of women to the service academies in the fall of 1975.
The Child Day Care Bill which provides $200 million more Federal assistance for child day care (signed Sept. 1, 1976).
The Tax Reform Act of 1976 which liberalizes the marital deduction for the transfer of assets between spouses, on the death of a spouse.
The Education Amendments of 1976 which includes Administration recommendations to reduce sex stereotyping in vocational education programs (signed October 13, 1976).
A bill which prohibits discrimination based on sex employment in Federally funded public works or relief programs. This bill also includes a provision imposing criminal penalties for sex discrimination (H.R. 11722, signed October 2, 1976).
A bill extending the Federal Revenue Sharing Programs and strengthening the civil rights enforcement provisions of this program (H.R. 13367, signed October 13, 1976).
A bill prohibiting sex discrimination in the administration of the Federal Property Act (H.R. 14451, signed October 17, 1976).
The Veterans Education and Employment Act of 1976 which would limit peace-time veterans preference. Persons entering military service after October 15, 1976, would not be eligible for veterans preference unless they served in a campaign or suffered a service-connected disability. The Civil Service Commission says that it has been apparent for some time that the statutory requirement of employment preference for veterans impacts adversely on employment opportunities for women as a group, since for many years they were denied enlistment in the armed forces on an equal basis (signed October 17, 1976).
The Civil Rights Attorney's Fees Awards Act of 1976, which give the Federal courts discretion to award reasonable attorney fees to prevailing parties in suits to enforce all civil rights statutes. The attorney's fee provision would apply to all major civil rights legislation enacted since 1964 (signed October 19, 1976). White House overview on women, Oct. 20, 1976.

[155] In his remarks proclaiming Aug. 26, 1975, as Women's Equality Day, President Ford said:

> In this Land of the Free, it is right, and by nature it ought to be, that all men and all women are equal before the law. Now, therefore, I Gerald R. Ford, President of the United States of America, to remind all Americans that it is fitting and just to ratify the Equal Rights Amendment adopted by the Congress of the United States of America, in order to secure legal equality for all women and men, do hereby designate and proclaim August 26, 1975, as Women's Equality Day. 11 *Weekly Compilation of Presidential Documents* 908 (Aug. 30, 1975).

He again encouraged ratification of ERA when he stated:

> . . .I call upon all the citizens of the United States to mark this day [Women's Equality Day, Aug. 26, 1976] with appropriate activities, and I call upon those States who have *not* ratified the Equal Rights Amendment to give serious consideration to its ratification and the upholding of our Nation's heritage. 12 *Weekly Compilation of Presidental Documents* 1285 (Aug. 30, 1976).

[156] Exec. Order No. 11832, Jan. 9, 1975, 3A C.F.R. 106,107 (Supp. 1975). The order was amended Nov. 25, 1975, extending the Commission to June 30, 1976. Exec. Order No. 11889, 3A C.F.R. 235 (Supp. 1975). The IWY Commission released its report, ". . .*To Form a More Perfect Union*. . ."

One accomplishment that President Ford reported was that 14 percent of his appointments were filled by women, the highest number during any one administration.[161] In 1976 women held positions such as Secretary of the Department of Housing and Urban Development; Assistant Secretary of State; Chairman, National Labor Relations Board; Under Secretary, Department of Health, Education, and Welfare; and Commissioner, Federal Communications Commission.[162]

Equality in retirement benefits for men and women was one area studied by White House staff. The basic issue was whether employers should be required to provide equal periodic benefits for men and women at retirement.[163] At the request of the President, the Equal Employment Opportunity Coordinating Council (EEOCC) studied the problem and concluded that ". . .it is a matter of sound public policy that periodic payments made to retired employees. . .should not reflect a differentiation based on sex."[164] Member agencies disagreed as to the need for legislation, however.[165] This Commission concluded that Title VII already prohibits the practice of paying unequal periodic benefits to men and women. In contrast, several other member agencies believed that this policy had not been clearly articulated by Congress. Thus the EEOCC recommended that the President ask Congress to enact legislation to effectuate such a requirement. Because of the conflict among the member agencies, President Ford requested the Domestic Council to

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Justice for American Women, on July 1, 1976, [hereinafter referred to as *To Form a More Perfect Union* .]

[157] Letter to the Honorable Edward H. Levi, Attorney General from Gerald R. Ford, President, July 1, 1976. The President's directive for a comprehensive review of all laws was an important and needed step. Inequities in Social Security, tax laws, and the justice system are examples of laws that need revision. For a further discussion of laws that need changing, see, *To Form a More Perfect Union* , *supra* note 156, at 68–73. Parenthetically, it is noted that Commission staff completed a similar review of the U.S. Code. Sections containing certain terms denoting gender such as "man," "woman," "son," or "daughter" were identified and analyzed for discriminatory content. The Commission anticipates that it will publish results of this analysis in 1977, with recommendations for substantive and linguistic changes to bring the U.S. Code into conformity with the principle of equality for women. Hopefully, the Department of Justice review will draw upon Commission expertise in this area.

[158] Pub. L. 94–167, 89 Stat. 1003 (Dec. 23, 1975).

[159] The White House, fact sheet, National Commission on the Observance of IWY, July 1, 1976.

[160] Remarks of the President to the National Commission on the Observance of International Women's Year, July 1, 1976, 12 *Weekly Compilation of Presidential Documents* 1109–10.

[161] President's remarks at a briefing for women in top level Government positions, 12 *Weekly Compilation of Presidential Documents* 703 (Apr. 26, 1976). In the briefing, President Ford stated that "14 percent of top jobs" in the Government were filled by women. The Special Assistant for Women stated that by "top jobs," Mr. Ford meant Presidential appointments. Holm and Keesling interview, *supra* note 19.

[162] See, *To Form a More Perfect Union* , *supra* note 156, for a list of women appointed during the Ford administration. See also, letter to attendees at the ceremony releasing the report from Jeanne M. Holm, Special Assistant for Women, the White House, July 14, 1976. Note, however, that a class action suit was filed against the President's Commission on White House Fellowships. (Stier v. President's Commission on White House Fellowships, Civil Action No. 75-1953 (D.DC. 1976)). Ms. Stier alleged that women were measured by standards not applied to male counterparts for the 1975–76 program to which she applied. The suit asks the court to name Ms. Stier as a White House Fellow for the 1976–77 program. However, no final judgment had been made on the case. Nearly half (8 out of 17) of those selected for the 1976–77 program were women. This represented a substantial increase over the previous program. For a list of the finalists for the current program, see 12 *Weekly Compilation of Presidential Documents* 937 (May 31, 1976). The President's Commission on White House Fellowships was established in 1964 by Exec. Order No. 11183, 3 C.F.R., 1964–1965 comp., p. 256. This Commission conducts an annual national competition for positions as White House Fellows and advises the President of its final recommendations of candidates. The President selects the finalists. Fellows are appointed for 1 year and serve as special assistants to the Vice President, members of the Cabinet, and the President's principal staff.

[163] Because employers use sex-based actuarial tables to determine benefits, female employees, because of their longer average life span, receive lower periodic benefits than similarly situated men. See, U.S. Commission on Civil Rights, *Civil Rights Digest*, vol. 2, no. 1, "Equality in Retirement Benefits, The Need for Pension Reform," Fall 1975.

[164] Letter from the Equal Employment Opportunity Coordinating Council to the President, Apr. 14, 1976.

[165] The Equal Employment Opportunity Commission did not sign the letter because it held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the practice of making unequal periodic benefits to men and women. The Commission on Civil Rights signed the letter to the President. However, it agreed with EEOC that Title VII prohibits unequal benefits to similarly situated men and women. It stated that the current Equal Employment Opportunity Commission sex discrimination guidelines can be fully justified in case law. "Congress should mandate sex-neutral practices by the insurance industry applicable to all forms of insurance." *Id* . The signatories to the letter are the Deputy Attorney General, Secretaries of Labor and Health, Education, and Welfare, and Chairmen of the Commission on Civil Rights and Civil Service Commission.

review the laws and recommend a uniform Government policy.[166]

Another area of concern to White House staff was the regulation implementing Title IX of the Education Amendments of 1972.[167] The former Special Assistant for Women perceived her role as making sure that both sides of any issues which arose were well-represented to the decisionmakers.[168] It was basically her view that the President reached sound conclusions on most of the major Title IX issues, such as self-analysis,[169] mechanisms for implementation, scholarships, athletics, and pensions.

Nonetheless, some weaknesses still remain:[170]

1) Physical education classes—Although the regulation prohibits sex-segregated physical education classes, it allows separation in contact sports and sex education classes.

2) Financial aid—Domestic wills or trusts which establish sex-restricted scholorships must be awarded on the basis of nondiscriminatory criteria. If sex-restricted funds are not equally available for males and females, institutions must obtain matching funds or restrict the awards to one sex, in equity with the other. However, universities are permitted to be conduits for foreign scholarships including wills and trusts, which are exempted from Title IX.[171]

3) Textbooks and curriculum—Sex stereotyping in textbooks and curriculum materials is not covered by the regulation. HEW has taken the position that it would be unconstitutional for the Federal Government to move into this area for fear of infringing the first amendment's guarantee of free speech.[172]

4) Athletics—The regulation allows exclusion of one sex from contact sports and in those sports in which competitive skill is the basis for selecting team members. As long as the school fulfills its responsibility with regard to overall equal opportunity, the insitution does not have to establish separate teams for the excluded sex.

President Ford publicly stated that he did not agree with all aspects of Title IX. For example, when asked at a public forum in Evansville, Indiana, what he thought of the prohibition against sex-segregated physical education, the President replied:

> I believe that some of the interpretations given to those regulations which were mandated have gone too far, and it is my impression that when we get down to the practicality of imposing those regulations, which I insist were mandated by the Congress, there, hopefully, will be some readjustments. . . .The enthusiasm that the Congress had when it passed the legislation I think has dimmed a little bit. . . .[173]

Similarly, the President directed the Department of Health, Education, and Welfare to suspend, pending a review, a ruling[174] which held that single-sex, parent-child federally assisted extracurricular school activities violate Title IX.[175] This Commission expressed its disagreement with the President's view noting that "parent-child events which are limited to parents of only one sex can be detrimental to the many American families which do not contain both a father and a mother."[176] This Commission further argued:

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[166] This development is reported by the Bureau of National Affairs, Inc., *Daily Labor Report* no. 122 (June 23, 1976).

[167] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681-1686. The implementing regulations are codified at 45 C.F.R. §86 (1975). Title IX provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. *Id*. at §1681(a).

[168] Lindh interview, *supra* note 8. Ms. Lindh's successor commented that the word "President" was more appropriate than "decisionmakers." Holm and Keesling interview, *supra* note 19. However, "decisionmakers" was the exact word used by Ms. Lindh.

[169] "Self-Analysis" as defined in Section 86.3 of the regulations is a requirement that:

> Each recipient education institution shall. . .evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity. . . .45 C.F.R. §86.3(c)(i) (1975).

[170] For other articles on Title IX, generally, see Todd, "Title IX of the 1972 Education Amendment: Preventing Sex Discrimination in Public Schools, *Texas Law Review* 103-26 (1974); "Sex Discrimination—The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make the Title Regulations More Effective," *Temple Law Quarterly* 207-22 (1975); and "Implementing Title IX: The HEW Regulations," *Univ. of Penna. Law Review* 806-42 (1976).

[171] It is encouraging that as a result of several new British laws guaranteeing equal opportunities for women, trustees of the Rhodes Scholarship Trust, which excludes women from competing, will petition the British government for permission to allow American women to compete for awards. *Equal Opportunity in Higher Education*, Jan. 19, 1976 [hereinafter referred to as *EOHE*].

[172] For articles refuting HEW's first amendment position, see Hodgson, "Sex, Texts, and the First Amendment," *Journal of Law and Education* 173-195 (April 1976), and Amyx, "Sex Discrimination: The Textbook Case," *California Law Review* 1312-1343 (1974). See also, Neiman, "Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles," 24 *The Hastings Law Journal* 1199-1202 (1973).

[173] *EOHE*, May 10, 1976.

[174] Letter from John E. Palomino, Education Branch Chief, OCR, HEW, to Ira C. King, evaluation coordinator, Scottsdale Public Schools, Phoenix, Ariz., June 25, 1976.

[175] 12 *Weekly Compilation of Presidential Documents* 1149-50 (July 12, 1976).

[176] Letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to the President, Sept. 14, 1976. The Commission explained that there were large numbers of children in this situation:

> According to recent Bureau of the Census statistics, 16 percent of all American families with children under 18 years of age have only one parent. The percentage is even higher for some minority groups; for example, 42 percent of black families fall within this category. Thus, one effect of permitting single sex parent-child events is to discriminate against minority children who are disproportionately represent-

> Sex segregation, like race segregation, inevitably leads to discriminatory treatment of one group. Twenty-two years ago, in *Brown* v. *Board of Education* , the Supreme Court recognized the terrible burden which racial segregation of the schools placed on children, concluding that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (347 U.S. 483, 495 (1954)). Those same psychological and social factors which make racial segregation "inherently unequal" apply as well to arbitrary sex segregation. . . .
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> Perhaps most significant is the fact that Title IX, in both language and intent, prohibits sex discrimination and sex segregation in federally assisted educational programs. Although some instances of such sex segregation may appear to be insignificant or of minimal concern, to permit Federal support of such activities constitutes a limitation on the coverage of Title IX and contributes to a gradual erosion of the quality principle as expressed in Title IX.[177]

President Ford also did not agree with Supreme Court decisions which have articulated the constitutional right of women to choose abortion. In 1973, in *Roe* v. *Wade* [178], the Supreme Court held that during the first 3 months of pregnancy, the State cannot bar any women from obtaining an abortion from a licensed physician. During the second trimester of pregnancy, the State can regulate abortion procedures only if such regulations relate to the preservation and protection of the woman's health. During the third trimester, the State can regulate or even prohibit all abortions except those necessary, "in appropriate medical judgement," to protect the woman's life or health.[179] The Court based its decision on a right to privacy, "Whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined in the Ninth Amendment's reservation of rights to the people. . . ."[180] This right to privacy was limited in the second and third trimesters by the long-established doctrine of compelling State interests, which provides a basis for State restriction of certain "fundamental rights" when there is clear evidence of a State interest in the goal to be obtained by the limitation.[181]

In *Doe* v. *Bolton* [182] the Court held that a Georgia statute which provided for certain restrictions on the accessibility of abortions was unconstitutional.[183] There has been noncompliance with the *Roe* and *Doe* decisions by Federal agencies. They had sometimes adhered instead to State laws[184] that were contrary to the Supreme Court's interpretation of the Constitution.[185] The White House had not directed Federal agencies providing health care to immediately bring program regulations and policies into compliance with *Roe* and *Doe* .[186]

President Ford, on numerous occasions, disagreed with the Supreme Court's decision on abortion. He stated, for example, "I do not believe in abortion on demand."[187]

He stated, "I do not agree with the Court decision of 1973."[188] President Ford views his position as

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ed in single parent families. In addition, the number of children living in single parent homes is steadily increasing, largely as a result of the increasing divorce rate. *Id* .

[177] *Id* .

[178] Roe v. Wade, 410 U.S. 113 (1973).

[179] *Id* . at 164, 165

[180] *Id* . at 153.

[181] *Id* . at 163, 164.

[182] Doe v. Bolton, 410 U.S. 179 (1973).

[183] The statute required that a hospital in which the abortion was performed be accredited by the Joint Commission on Accreditation of Hospitals, that a committee approve the abortion, and that two practicing physicians concur in the treating physician's recommendation. *Id* at 184.

[184] Many States enacted unconstitutional restrictive abortion statutes. These included, for instance, several which limited or prohibited Medicaid payments for abortion, required consent of spouse or parents, established unreasonable record keeping and reporting requirements, and require elaborate procedures for regulation of abortions. U.S. Commission on Civil Rights, *Constitutional Aspects of the Right to Limit Childbearing* 8 (April 1975). In July 1976, the Supreme Court ruled, however, that spousal and parental consent required by a Missouri abortion statute was unconstitutional. Planned Parenthood of Missouri v. Danforth, U.S. , 96 S.Ct. 2831 (1976).

[185] The Commission wrote to President Ford on June 10, 1975, noting that a directive to the Department of Defense issued by President Nixon in 1971 had the effect of encouraging compliance with State laws and noncompliance with the Court's rulings on abortion. Letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to the President, June 10, 1975.

[186] *Id* . The Associate Director and Counsel of the Domestic Council wrote to this Commission stating that the Nixon order would not require compliance with State laws conflicting with the Court's decisions and that noncompliance with Roe and Doe could be the result of pocr legal advice but not of adherence to the Nixon order, per se. He stated that he had referred the matter to the General Counsel of the Department of Defense to determine the necessity for further action and that he would keep this Commission informed on the matter. Letter from Richard D. Parsons, Associate Director and Counsel, Domestic Council, the White House, July 16, 1975.

In September 1975, the Assistant Secretary of Defense made clear that the military departments must comply with the Supreme Court's decisions on abortion. Memorandum from James R. Cowan, Assistant Secretary of Defense, to Assistant Secretaries of the Military Departments, "Abortion Policy," Sept. 17, 1975. A similar issuance was made by the Department of Health, Education, and Welfare. *HEW News* , Dec. 6, 1975. Other agencies, such as the Peace Corps and the Department of State, did not follow suit. The White House did not inform the Commission on the status of this matter after Mr. Parson's July 17, 1976, letter.

[187] 12 *Weekly Compliation of Presidential Documents* 1182 (July 19, 1976).

[188] Remarks during the filmed interview with CBS television newsman Walter Cronkite, Office of the Press Secretary, the White House, Feb. 3, 1976, White House transcript. President Ford did state, however, ". . .even

"moderate." He also stated "I don't go along with those who advocate [a constitutional] amendment that would be so ironclad you couldn't under any circumstances have an abortion."[189]

The President, however, supported a proposed constitutional amendment which, in his words, "would permit each State on its own through a vote of the people or through its State legislative branch to adopt its own State regulations."[190]

This Commission opposed such an amendment for several reasons. As this Commission wrote to the President, for instance, a "States' rights" amendment would inevitably place a burden on low- and middle-income women, who would not have the financial resources to travel to seek an abortion in States retaining liberal abortion laws. Under the guise of permitting States to allow, regulate, or prohibit the practice of abortion, the "States rights" constitutional amendment would provide a renewed opportunity for State invasion of the individual's constitutional rights.[191]

Another form of discrimination which the White House did not adequately address was sex discrimination in federally assisted programs. As this Commission has noted:

> Federal financial assistance extends into every area of our national life. It affects the lives of most of the population and plays a vital role in the social and economic well-being of the country.[192]

There is no comprehensive law forbidding discrimination against women in the distribution of Federal assistance,[193] and this Commission has previously called attention to the problem.[194] In November 1975, this Commission wrote to the President recommending that he issue an Executive order prohibiting such discrimination.[195] Although in late December 1975, the former Special Assistant for Women's Affairs stated that she was interested in this issue and hoped to make a recommendation to the President, she was given no assignment in this area.[196]

In April 1976, the current Special Assistant for Women met with Department of Justice officials to request that they prepare a draft Executive order and legislation to expand Title VI to include sex.[197] In October 1976, the Justice Department completed the draft and the Special Assistant met with staff of the Domestic Council and OMB to discuss it. In December 1976, the proposed legislation was circulated by OMB to Federal agencies for comment.[198] As of late 1975, the principal activities of the Special Assistant did not include such issues as health care and the economic social needs of women in poverty,[199] which were of special interest to minority women.[200] The Special Assistant indicated that the reason these issues had not received more emphasis in the White

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though I disagree with the court decision, I have taken an oath of office, and I will, of course, uphold the law as interpreted by the court, but I think there is a better answer." *Id*.

[189] 12 *Weekly Compilation of Presidential Documents* 1182 (July 19, 1976). Amendments introduced to the Congress which directly prohibit abortions include: S.J. Res. 130, 93rd Cong., 1st Sess. (1973) and S.J. Res. 6, 94th Cong., 1st Sess. (1975), which would have prohibited abortion even to save the mother's life. S.J. Res. 119, 93rd Cong. 1st Sess. (1973) and S.J. Res. 10 and 11, 94th Cong., 1st Sess. (1975) which prohibit abortion but allow for an exception if it would prevent a mother's death. For a list of consitutional amendments proposed in Congress to restrict rights to limit childbirth, see *Constitutional Aspects of the Right to Limit Childbearing, supra* note 184, at 105.

[190] White House transcript, *supra* note 188. Two such proposed amendments are H.J. Res. 468, 93rd Cong., 1st Sess. (1973) and H.R.J. Res. 96, 94th Cong., 1st Sess. (1975) which would leave the decision as to whether to permit abortions up to the individual States.

[191] *Constitutional Aspects of the Right to Limit Childbearing, supra* note 184. The Commission's position is also set forth in a letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to the President, Mar. 10, 1976.

[192] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, To Extend Federal Financial Assistance* 3 (November 1975) [hereinafter referred to as *To Extend Federal Financial Assistance*].

[193] Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in any program or activity receiving Federal financial assistance. It does not prohibit sex discrimination. 42 U.S.C. 2000d (1970).

[194] *To Extend Federal Financial Assistance, supra* note 192.

[195] Letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to the President, Nov. 12, 1975. Precedent for the type of Executive action this Commission recommended is found in the issuance of Executive Orders 10925 and 11063 by President John F. Kennedy. Executive Order 10925, a predecessor of Executive Orders 11246 and 11478, directed Federal agencies to prevent discrimination based on race, color, religion, or national origin within Federal employment and by Federal contractors and subcontractors. Executive Order 11063 directs Federal agencies to prevent racial and ethnic discrimination in federally assisted housing programs. Both of these orders were issued long before Federal law articulated the principle of equal opportunity in the areas of employment and housing.

[196] Lindh interview, *supra* note 8.

[197] Holm and Keesling interview, *supra* note 19.

[198] *Id*. The legislation (H.R. 407) was submitted to Congress Jan. 4, 1977.

[199] An increasing number of female-headed families live in poverty. As of March 1972, there were a little over 53 million families of which 6.2 million were headed by women. Of the female-headed families, 34 percent live below the poverty level, while only 7 percent of male-headed families are poor; for a discussion of this issue, see, U.S. Commission on Civil Rights, *Women in Poverty* (June 1974). Further, families headed by minority women suffer even more. For example, 32 percent of black families are female-headed, and 54 percent of these are in poverty. Of the 14 percent of Mexican American families headed by females, 66 percent live in poverty; and of the 58 percent of Puerto Rican families headed by women, 65 percent live in poverty. In contrast, of the 9 percent of white families headed by a female, 27 percent live in poverty. U.S. Women's Bureau, Department of Labor, *Facts About Women Heads of Household and Heads of Families.* Data for black and white women are for 1971, and data for Puerto Rican and Mexican American women are for 1970.

[200] Another area of interest to minority women in which the administration record was poor was minority business enterprise. See sec. VI(E) *infra*.

House was that outside groups had not brought them to her attention.[201]

III. DISCRIMINATORY EFFECTS OF THE ARAB BOYCOTT

The League of Arab States organized a boycott[202] of Israel, products manufactured in Israel or by those the League regards as supportive of Israel, and countries and corporations doing business with Israel.[203] There were numerous allegations that one effect of the boycott was discrimination,[204] within the jurisdiction of this country, against Jewish employees and prospective employees, and firms with Jewish managers, for example.[205] As a result, President Ford stated at a February 26, 1975, press conference that ". . .such discrimination is totally contrary to the American tradition and repugnant to American principles. . . ." and ". . .allegations of discrimination will be fully investigated and appropriate action taken under the laws of the United States. . . ."[206]

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[201] Lindh interview, *supra* note 8. Ms. Lindh's successor disagreed with the conclusion that the activities of White House staff did not focus sufficiently on issues of special interest to minority women. She stated that since March 1976, activities were generated in the areas of employment and problems of women in business. She noted that a meeting was held in the White House Mar. 3, 1976, to discuss women in business. Invited to this meeting were national business women's organizations and Federal agencies charged with responsibility in this area. Ms. Holm stated that she met with officials at the Department of Labor to discuss discrimination in employment and met with officials at the Department of Health, Education, and Welfare to discuss problems in education and health care. Ms. Holm also stated that she met with many minority women groups and worked with the Special Assistants for Minority, Ethnic, and Hispanic Affairs to identify concerns of minority women. Some of the problems identified, as a result of these meetings, were employment, single parent families, education, difficulties of women in small businesses, and child care. She stated that the groundwork for these activities was laid by Ms. Lindh. Holm and Keesling interview, *supra* note 19.

[202] The League of Arab States is a voluntary association of sovereign Arab States, established in March 1945. Several lists have been published naming the Arab countries participating in the boycott. The Department of Justice in a brief filed against the Bechtel Corporation listed the following 20 countries: Algeria; Bahrain; Egypt; Iraq; Jordan; Kuwait; Lebanon; Libya; Mauritania; Morocco; Oman; People's Democratic Republic of Yemen; Qatar; Saudi Arabia; Somalia; Sudan; Syria; Tunisia; United Arab Emirates (Abu Dhabi, Ajman, Dubai, Fujaira, Ras Al-Khaimah, Sharjah, Um Al-Quaiwan); Yemen Arab Republic. United States v. Bechtel Corp., No. C-76-99 at 5 (N.D. Cal. 1976). For variations on the list see *Hearings on Political and Financial Consequences of the OPEC Price Increases Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations* , 94th Cong., 1st Sess., at 214 (Feb. 26, 1975) [hereinafter referred to as *Hearings on Political and Financial Consequences*] and Business International, *Weekly Report to Managers of Worldwide Operations* at 65 (Feb. 28, 1975).

[203] League of Arab Countries, General Secretariat, Head Office for the Boycott of Israel, General Principles for Boycott of Israel, June 1972 [hereinafter referred to as *General Principles*] reprinted in *Hearings on Political and Financial Consequences* . For additional information on the boycott, see J. Bahti *The Arab Economic Boycott of Israel* , the Brookings Institution (February 1967); A. Himley II, League of Arab States permanent observer to the United Nations, "The Arab Boycott: An Instrument of Peaceful Self-Defense," 8 *National Journal Reports* 1090 (July 31, 1976); W.E. Simon, "United States Policy on the Arab Boycott," 8 *National Journal Reports* 1093 (July 31, 1976); and A. Ribicoff, United States Senator, "Taxing the Boycott," 8 *National Journal Reports* 1094 (July 31, 1976); *Hearings on Political and Financial Consequences* , opening statement of Subcommittee Chairman, Senator Frank Church, pt. II, at 195 (Feb. 26, 1975); and "That Curious Barrier on the Arab Frontiers" *Fortune* 82 (July 1975).

[204] The American Jewish Congress summarized the mechanisms that it alleged result in discrimination:

> Among the conditions accepted by American firms, or at times, self-imposed by them in order to qualify for Arab business are agreements to refrain from doing business in Israel or with Israeli companies or nationals, as well as agreement to refrain from doing business with any American company trading with Israel, its companies or nationals.
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> Even more insidious is the fact that Senate investigations have found evidence that some Arab states have denied trade to American companies with Jewish executive or associates, thereby putting pressure on American firms to break the law and discriminate against United States citizens. The architectural profession and construction industry, it is thought have been particularly vulnerable to Arab boycott demands and pressures. Attachment to letter from Philip Baum, associate executive director, American Jewish Congress, to Bert Silver, Director, Office of Management, U.S. Commission on Civil Rights, Dec. 1, 1976.

[205] For example, the Deputy Director of Military Construction of the U.S. Army Corps of Engineers, Col. William L. Durham, stated that because of Saudi Arabian visa requirements, personnel of the U.S. Army Corps of Engineers of the Jewish faith could not work on projects in Saudi Arabia. *Hearings on Political and Financial Consequences* , *supra* note 202, at 207–08. Similarly, it was alleged that personnel of the U.S. Air Force who are Jewish were not permitted to enter Saudi Arabia. *Id* . at 207, 218. Harold Saunders, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs, stated he was aware of no Jewish State Department personnel who entered Saudi Arabia except Secretary of State Henry Kissinger and members of the party traveling with him. *Id* . at 217–19.

In addition, it was alleged that a corporation which contracted to hire American medical personnel for a Saudi Arabian hospital required job applicants to submit religious identification for the purposes of screening out Jewish applicants. It was also alleged that an oil company utilized an employment application form which stated that "employment is predicated upon the applicant's ability to obtain a visa from the Saudi Arabian government. . . ." and that visas are frequently granted only after presentation of a baptismal certificate. Another company which recruited personnel for the Saudi Arabian Army Ordinance Corps allegedly requested religious information on its employment forms for the purpose of screening out Jewish applicants. Letter from Rabbi Arthur Hertzberg, president, American Jewish Congress, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Oct. 3, 1975. Rabbi Hertzberg's letter contained numerous other allegations of discrimination resulting from the boycott.

A California based heavy construction and highway contractor had a contract with the Army Corps of Engineers for construction projects in Saudi Arabia which allegedly contained clauses prohibiting or limiting the employment of Jews and women on the firm's Saudi Arabian work sites. The contract was subsequently revised to eliminate these clauses. Report of Department of Defense, Interdepartmental Study Group on Equal Opportunity, undated, at 6.

In addition it was alleged that Saudi Arabia requested that women and blacks be barred from consideration for employment as highway engineers on a proposed project involving the California Department of Transportation. This allegation, however, appeared to have been not well founded. An employee of the Department of Transportation informed Commission staff that Saudi Arabia never prohibited blacks and women from consideration for employment but rather a California State employee presumed women and blacks would not be considered. The proposed project was never finalized. Telephone interview with James Turk, fair employment practices consultant, State of California, Department of Transportation, Division of Highways, Feb. 20, 1976. This allegation was also denied by the Saudi Arabian Ambassador to the United States, Ali Alireza, in a formal statement concerning employment opportunities in Saudi Arabia. Saudi Arabian Press Release, Nov. 25, 1975.

Further allegations were made in Baum letter and attachment, *supra* note 204; letter and attachment from Philip Baum, associate executive director, American Jewish Congress, to Bert Silver, Director, Office of Management, U.S. Commission on Civil Rights, Dec. 3, 1976; Geri Joseph, cochairperson, National Discriminations Committee, Anti-Defamation League of B'nai B'rith, "Arab-Inspired Anti-Jewish Employment Discrimination Cases," Dec. 6, 1975; and testimony of Burton S. Levinson, national commissioner, Anti-Defamation League of B'nai B'rith on Assembly Bill 3080 before the Judiciary Committee, California State Senate, June 22, 1976.

On March 4, 1975, the President issued a memorandum to the Attorney General and the Secretaries of State, the Treasury, Defense, and Commerce, reiterating his February comments and requesting those cabinet officers, ". . .to ensure that any allegations of discrimination made to you are fully investigated and that appropriate action is taken in the event of violation of the laws of the United States. . . ."[207] This letter was followed on April 18, 1975, by a memorandum from White House Associate Counsel Roderick Hills[208] requesting Federal agencies to furnish reports cataloguing boycott-related problems which had come to their attention.[209]

In May the White House convened an ad hoc advisory group consisting of representatives from several Federal agencies including the Departments of State, Defense, Commerce, the Treasury, Labor, and Justice, Civil Service Commission, Equal Employment Opportunity Commission, Office of Management and Budget, Domestic Council, and National Security Council. The group was to consider the most effective and appropriate Federal course of action to deal with the domestic impact of Arab boycott matters, including religious and ethnic discrimination. The advisory group held several meetings pertaining to matters of religious and ethnic discrimination.[210]

On November 20, 1975, its work culminated in two issuances: (1) a Presidential memorandum to the heads of Federal departments and agencies concerning employee assignments overseas[211] and (2) a statement by the President listing the measures he requested Federal agencies to take for countering any discrimination arising from boycott practices.[212] The forceful nature of the President's leadership was an excellent illustration of the extent to which a committed President can mobilize Federal agencies to protect the rights of a mistreated group.[213] There was no comparable collection of directives on any other single civil rights problem within the past seven and a half years.

1. Memorandum to the Heads of Departments and Agencies

President Ford's November 20, 1975, memorandum to Federal agencies and departments instructed them to disregard the exclusionary policies of host countries in selecting employees for overseas assignments and directed them to advise the Department of State if any employee's visa were denied due to exclusionary policies based on race, color, religion, sex, national origin, or age. It required the State Department to ". . .take appropriate action through diplomatic channels to attempt to gain entry for the individual. . . ."[214] The President's memorandum, while positive, did not make clear what constituted "appropriate action," how much effort the State Department should put forth in order to satisfy the requirements that it "attempt to gain entry," or what actions would be taken if entry could not be gained.

In response to this Presidential directive, the Secretary of State, Henry A. Kissinger, also issued a memorandum to the heads of all Federal departments and agencies instructing them to report all visa denials to him personally.[215] In order to implement the memorandum, the Department of State used the following procedures: When a visa denial was referred to the Department of State, a departmental official took up the problem with the country's diplomatic representatives or referred it to the American embassy in the country.[216] Sometimes both approaches were used.[217] Several State Department officials stated that in cases where the State Department had been requested to intercede, it had always been successful in obtaining visas for American citizens.[218] However, as of February 1976, the State Department had apparently not established a policy for dealing with cases where all diplomatic representations fail.[219]

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[206] Presidential Press Conference, Hollywood, Fla., Feb. 26, 1975. *Presidential Documents, Gerald R. Ford*, vol. II at 218 (1975).

[207] Memorandum from the President to the Secretaries of State, the Treasury, Defense, and Commerce, and the Attorney General, Mar. 4, 1975.

[208] In March 1975 the President assigned responsibility for overseeing the handling of all boycott matters, including religious or ethnic discrimination, to the White House Associate Counsel, Roderick M. Hills. In July 1975 Mr. Hill's responsibility for boycott matters were assigned to Associate Counsel Barbara Kilberg. Interview with Barbara Kilberg, Associate Counsel to the President, Jan. 3, 1976.

[209] Copies of these reports were not made available to U.S. Commission on Civil Rights staff who had requested them. A member of the White House staff stated the reports were considered part of the President's decisionmaking process and the release of the reports to other sources could hurt the decisionmaking process by making it more difficult to obtain honest and forthright answers from Federal agencies. 1976 Kilberg interview, *supra* note 208.

[210] 1976 Kilberg interview, *supra* note 208. Ms. Kilberg estimated the number of meetings was from three to five. *Id*.

[211] Memorandum from President Gerald R. Ford to the Heads of Departments and Agencies, Nov. 20, 1975, [hereinafter referred to as President's memorandum].

[212] The White House, Statement by the President, Nov. 20, 1975, [hereinafter referred to as President's Statement].

[213] This Commission commended the President for his actions. Letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to President Gerald R. Ford, Jan. 27, 1976.

[214] President's memorandum, *supra* note 211.

[215] Memorandum from Henry A. Kissinger, Secretary of State, to Heads of All Federal Departments and Agencies, Nov. 28, 1975.

[216] Telephone interview with David Morrison, Senior Development Advisor, Office of Regional Affairs, Bureau of Near Eastern and South Asian Affairs, U.S. Department of State, Feb. 3, 1976. The only Middle Eastern countries with which the United States did not maintain formal diplomatic relations were Iraq and the People's Democratic Republic of Yemen (PDRY) (South Yemen). The U.S. maintains an American Interest Section in the Belgian Embassy in Baghdad, Iraq. There is an Iraqi interest section in the Indian Embassy in the United States. Representations for appealing visa

The President's memorandum also instructed Federal agencies and departments to review their overseas assignment selection procedures for conformance with Federal anti-discrimination law[220] and regulations and, within 60 days of the date of the memorandum, provide the Civil Service Commission (CSC) with a copy of their internal policy guidance prohibiting consideration of exclusionary policies of foreign countries[221] in making overseas assignments. CSC's review of agency responses[222] revealed that policy guidance statements furnished by some Federal agencies contained language which was sufficiently ambiguous to permit discriminatory practices to continue.[223] For example, a directive of the U.S. Army concerning the selection and assignment of civilian personnel stated: ". . .non-merit requirements of foreign nations will not be used as screening factors but applicants should be advised of the mores and folkways of the foreign nations without comment to influence the applicant. . . ."[224] Similarly, the Department of Commerce memorandum stated: "Adoption of this policy does not preclude consideration of the safety of individual employees and their dependents, or consideration of the effectiveness of an individual's services in a hostile environment. . . ."[225] Neither agency's policy guidance suggested how to provide information on potentially hostile conditions without discriminatorily discouraging employees from applying for overseas assignments. As of June 1976, CSC officials had prepared but not sent letters requesting both agencies to revise their policy statements in accordance with the President's memorandum.[226]

2. Statement Regarding Discrimination Arising from Boycott Practices

President Ford's second issuance of November 20, 1975, cited several additional areas in which he required Federal agencies to adopt measures for countering possible discrimination arising from boycott practices. The principal among these were: (1) he directed the Secretary of Commerce to amend the Export Administration Act regulations[227] to prohibit U.S. exporters from complying with boycott requests in such a way as to discriminate against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin and to require the reporting of any involvement with boycott requests;[228] (2) he urged the Securities and Exchange Commission to take whatever action it deemed necessary to prevent discrimination against investment banking firms;[229] (3) he instructed the Secretary of Labor to notify Federal contractors and subcontractors of their

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denials by Iraq would be made through the Iraqi Interest Section in this country and the American Interest Section in Baghdad. Since the U.S. did not maintain diplomatic relations of any kind, formal or informal, with PDRY, representations for appealing visa denials would have to be made through another country or through a PDRY mission in another country. Telephone interview with David Morrison, Senior Development Advisor, Office of Regional Affairs, Bureau of Near Eastern and South Asian Affairs, U.S. Department of State, Feb. 5, 1976.

[217] The State Department utilized whichever method it believed would be most successful in each particular case. Feb. 5, 1976, Morrison interview, *supra* note 216.

[218] Telephone interviews with David Morrison, Senior Development Advisor, Charles Cecil, Country Officer for Saudi Arabia and Marguerite King, Country Officer for Libya, Office of Regional Affairs, Bureau of Near Eastern and South Asian Affairs, U.S. Department of State.

[219] Feb. 3, 1976, Morrison interview, *supra* note 216.

[220] The President cited, in particular, Executive Order No. 11478 (3 C.F.R. 133 (1969); The Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16, 17 (Supp. V, 1975); and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634 (Supp. V, 1975).

[221] President's memorandum, *supra* note 211. On Dec. 5, 1975, CSC issued a memorandum to the directors of personnel and equal employment opportunity in all Federal agencies requiring them to furnish copies of policy guidance on overseas assignment of personnel not later than Jan. 20, 1976. Memorandum from Joseph W. Lowell, Jr., Assistant Executive Director, CSC, to Directors of Equal Employment Opportunity and Directors of Personnel, Dec. 5, 1975.

[222] All agencies responded to the memorandum. Telephone interview with Carmen Nieves, Personnel Management Specialist, Civil Service Commission, Feb. 23, 1976.

[223] Telephone interview with Carmen Nieves, personnel management specialist, Civil Service Commission, June 29, 1976.

[224] A U.S. Army telecommunication sent to all Army activities, May 2, 1975.

[225] Letter from Guy W. Chamberlain, Acting Assistant Secretary for Administration, U.S. Department of Commerce, to Secretarial Officers and Heads of Operating Units, Dec. 24, 1975.

[226] June 1976 Nieves interview, *supra* note 223. Similarly, the following is a quotation from United States Information Agency (USIA) directive which CSC asked USIA to revise:

> Prospective assignees are counseled as to the conditions under which they will have to work so that they may raise objections or at least know what to expect. Care is taken not to dramatize problems or otherwise seem to be deliberately discouraging. Rather, in describing the conditions of a particular assignment, all conditions are made known to all candidates, regardless of race, color, religion, national origin, sex, or age. Of course candidates are always given opportunity to express their personal preference for those assignments where they feel they will be most effective. . . .Letter from Eugene P. Kopp, Acting Director, United States Information Agency, to Joseph W. Lowell, Jr. Assistant Executive Director, CSC, Jan. 16, 1976.

USIA later submitted a revised policy statement which conformed to the President's directive. June 1976 Nieves interview, *supra* note 223.

[227] Export Administration Act of 1969, 50 U.S.C. §§2401 *et seq*. (1970). The regulations are in 15 C.F.R. §369 (1976).

[228] President's Statement, *supra* note 212.

[229] *Id*.

obligation to inform the State Department of visa denials;[230] and (4) he encouraged the Federal financial regulatory agencies[231] to issue policy statements similar to one issued earlier by the Comptroller of the Currency prohibiting racial or religious discrimination in banking practices.[232] In his statement the President also supported legislation amending the Equal Credit Opportunity Act (ECOA) to include race, color, religion, and national origin as prohibited discriminatory indices,[233] and he proposed new legislation prohibiting economic coercion intended to foster discrimination based on race, color, religion, sex, or national origin.[234] In addition, the President requested the Justice Department to examine the application of anti-trust laws to boycott practices, including practices resulting in discrimination.[235]

At least one Federal agency did more than was required by the President's November 20 statement. As the President had directed, the Secretary of Commerce, Rogers C.B. Morton, amended the implementing regulations of the Export Administration Act of 1969.[236] The amended Export Administration regulations required United States exporters and related service organizations[237] to report to the Department of Commerce all restrictive trade practices requests (boycott requests) they received, including discriminatory requests based on race, color, religion, sex, or national origin, and prohibited them from supporting or furthering such requests. Going beyond the President's November 20 directive, the Secretary also issued a policy directive prohibiting the distribution of trade tenders[238] which contained conditions seeking to impose or foster a boycott against a country friendly to the United States.[239]

Most of the other Federal agencies affected by the President's statement responded with statements of their own. For example, on the same date as the formal issuance of the President's statement, the Securities and Exchange Commission issued a policy statement opposing religious or ethnic discrimination in the securities industry.[240] Similarly, the Secretary of Labor issued a memorandum to the heads of all departments and agencies informing them that Federal contractors and subcontractors must notify the State Department whenever, because of discrimination based on race, religion, sex, or national origin, any of their employees was denied a visa to perform work in a foreign country.[241]

The Federal financial regulatory agencies complied with the President's request: the Board of Governors of the Federal Reserve System issued two directives to Federal Reserve Banks,[242] and the Federal Home Loan Bank Board issued a directive to the financial institutions under its jurisdiction.[243] The Federal Deposit Insurance Corporation, however, did not issue its policy statement[244] until May 1976.[245]

Although President Ford's statement produced some positive actions with regard to curbing racial, ethnic, religious, and sex discrimination, it could have gone further. While the President directed Federal agencies and Government contractors to report to the State Department all instances of visa denials involving employees for employment,[246] no similar policy was established for private employers who were not Government contractors.[247] The President could have avoided this deficiency by requesting the Equal Employment Opportunity Commission to develop guidelines on visa denials for the private sector similar to the procedures established for Federal agencies and Government contractors.[248] Further, the President's program did not resolve a problem facing companies which, in order to practice nondiscrimination, refused to comply with the boycott and thus lost their Arab trade opportunities. Such companies may lose U.S. tax benefits for companies which operate abroad.[249]

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[230] *Id.*

[231] The Federal financial regulatory agencies are the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve System, in addition to the Comptroller of the Currency.

[232] *Id.* The Comptroller's policy was issued by the Comptroller of the Currency as Banking Bulletin 75-3 (Feb. 24, 1975). A representative of the American Jewish Congress described one mechanism by which he believed discrimination occurred in banking practices, in addition to discrimination in employment practices. He stated: ". . . [T]he American banking community has been acting as enforcers and agents of the boycott by agreeing to honor letters of credit that require evidence that the stipulated boycott restrictions have been met by the American business." Attachment to Baum letter, *supra* note 204.

[233] President's Statement, *supra* note 212. This legislation was passed, and signed by the President on Mar. 23, 1976. Equal Credit Opportunity Act Amendments, Pub. L. 94–239, 90 Stat. 251, amending 15 U.S.C. §1691. The law as amended prohibits discrimination based on race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract).

[234] President's Statement, *supra* note 212.

[235] *Id.*

[236] 15 C.F.R. §§369.2(b)(1), 369.4 (1976).

[237] Related service organizations included banks, insurers, freight forwarders, and shipping companies.

[238] A trade tender is a notice of an opportunity to conduct trade with foreign countries or foreign businesses.

[239] U.S. Department of Commerce, Secretary's Circular Number 21, Nov. 26, 1975.

[240] Securities Exchange Act Release No. 11860, Nov. 20, 1975.

[241] Memorandum from John T. Dunlop, Secretary of Labor, to Heads of all Departments and Agencies, Nov. 24, 1975.

[242] Letters from Theodore E. Allison, Secretary, Board of Governors of the Federal Reserve System, to the Presidents of all Federal Reserve Banks and the Officers in Charge of Branches, Dec. 12, 1975, and Jan. 20, 1976.

[243] Memorandum from Garth Marston, Acting Chairman, Federal Home Loan Bank Board, to all Chief Executive Officers of Insured Institutions, Dec. 19, 1975.

[244] The Assistant General Counsel for the FDIC stated that the agency had not seen a need to issue a statement since the State banks under its jurisdiction were generally small banks engaged in local financial transactions having no involvement in international financial matters. Telephone interview with Roger A. Hood, Assistant General Counsel, Federal Deposit Insurance Corporation, Jan. 16, 1976.

[245] Letter from Robert E. Barnett, Chairman, Federal Deposit Insurance Corporation, to Chief Executive Officers of Insured State Nonmembers Banks, May 26, 1976.

[246] The Secretary of Labor subsequently issued a memorandum to that effect. Memorandum from John T. Dunlop, Secretary of Labor, to Heads of all Departments and Agencies, Employment Discrimination Based on Religion or National Origin by Federal Contractors Engaged in Operations

Another serious deficiency with the President's statement involved the Federal financial regulatory agencies. The President informed them that a banking bulletin issued by the Comptroller of the Currency on discriminatory banking practices[250] reflected administration policy, and he encouraged them to issue similar policy statements. While the banking bulletin specifically prohibited banking practices or policies based upon the race or religious beliefs of customers, stockholders, officers, or directors of banks, it failed to include banking practices[251] or policies predicated upon sex.[252] As a result, none of the Federal financial regulatory agencies' issuances specifically prohibited sex discrimination. Yet it appeared that certain boycott restrictions could result in sex discrimination, at least in the area of employment.[253]

IV. THE DOMESTIC COUNCIL

The Domestic Council's official function, to coordinate domestic policy formulation,[254] was established during the Nixon administration. As of April 1976, the Council continued to be the prime forum for review of domestic policy issues.

In fiscal year 1975, the Domestic Council had the equivalent of 35 full-time positions,[255] a sharp decrease in size from 80 positions in fiscal year 1973 under the Nixon administration.[256] The staff size for fiscal year 1976 was projected to increase to 42 total positions, including full-and part-time employment. The Domestic Council's budget for fiscal year 1976 was projected at $1.6 million.[257]

The Domestic Council staff was headed by an Executive Director,[258] who also served as the Assistant to the President for Domestic Affairs, 2 deputy directors, and 10 associate directors.[259] The associate directors had responsibilities for: intergovernmental affairs; transportation; environment; health, social security, and welfare; agriculture,

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or Activities Outside the United States or for Foreign Governments or Companies Within the United States (undated).

[247] President's statement, *supra* note 212. There were approximately 38 million employees in the private sector who are not employed by Government contractors. U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—Vol. V, To Eliminate Employment Discrimination* 230 (July 1975) [hereinafter referred to as *To Eliminate Employment Discrimination*] and U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* table B-2 (May 1976).

[248] Such a Presidential directive to the Equal Employment Opportunity Commission would have been appropriate because Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. §2000e (Supp. V, 1975)) prohibits discrimination on the basis of religion. The Department of Justice interpreted Title VII of the Civil Rights Act of 1964, as amended, and Exec. Order No. 11478 (3 C.F.R. 133 (1969)) as providing authority for the President's directive that Federal agencies must report visa denials to the State Department. In addition, the Department of Justice cites Title VII and Exec. Order No. 11246 (3 C.F.R. 339 (1965)) as amended as authority for the President's directive that Government contractors must report visa denials to the State Department. Title VII also applies to private employers who are not Federal contractors.

Concerning Title VII as amended, the Assistant Attorney General, Office of Legal Counsel, stated:

> Title VII [contains an express exemption] permitting discrimination on the basis of religion, sex, or national origin in circumstances where such factors are "a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." It is questionable whether even that express exemption would justify rejection of a Jewish applicant for a job to be performed in a country which does not issue visas to Jews.

The Assistant Attorney General noted that while there was "no Federal case law on the subject, a New York State trial court rejected such application of a comparable exemption under the State's antidiscrimination regulation, referring to "American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S. 2d 218 (Sup. Ct. 1959), *modified*, 10 App. Div. 2d 833, 199 N.Y.S. 2d 157 (1969), *aff'd*, 9 N.Y. 2d 223, 213 N.Y.S. 2d 60, 173, N.E. 2d 788 (1961)." Testimony of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on Federal Civil Rights Laws Relating to Overseas Assignments before the Subcomm. on Government Information and Individual Rights Committee on Government Operations, Apr. 9, 1975.

[249] For a discussion of this problem see "Taxing the Boycott," *supra* note 203.

[250] Comptroller of the Currency, Banking Bulletin 75-3 (Feb. 24, 1975). This policy extends both to lending and employment practices. For a discussion of one way in which lending practices were alleged to facilitate boycott-related discrimination see note 232 *supra*.

[251] Banking practices include both employment and lending practices.

[252] A member of the White House staff stated that sex discrimination had not been a problem in this regard and that the White House tried to highlight the problem of religious discrimination. 1976 Kilberg interview, *supra* note 208.

[253] See Flemming letter, *supra* note 94. See also, memorandum from Richard K. Lignoul, commissioner of Banks and Trust Companies, State of Illinois, to all Illinois State Banks, Oct, 27, 1975.

[254] A more detailed description of this function is given in pt. A, sec. IV *supra*. See also President Nixon's statement of Mar. 12, 1970, to the Congress, to accompany Reorganization Plan No. 2 of 1970. The plan and statement are set out as a note following 31 U.S.C. §16 (Supp. 1971). Since 1970, there have been no new Presidential directives concerning the functions of the Council.

[255] There were 30 full-time positions and several part-time positions which constituted the equivalent of 5 additional full-time positions. *1977 Budget Appendix* at 66.

[256] During fiscal year 1973, the staffing of the Domestic Council was at its highest.

[257] *1977 Budget Appendix* at 66. The projected staff total for fiscal year 1977 was 45 positions. *Id*.

[258] As of March 1976, this position was headed by James H. Cannon.

[259] Under the Nixon administration there were only five associate directors. One associate director commented that under the Ford administration the number of associate directors had increased in order to narrow the responsibilities of Council staff. May interview, *supra* note 88.

economic development, and commerce; labor, education, and veterans affairs; housing, community affairs, and communications; policy and planning; energy and science; and justice, civil rights, and drugs. The Associate Director for Justice, Civil Rights, and Drug Abuse also served as General Counsel.[260]

Due to the small size of the Council staff, associate directors had almost no staff assistance from within the Domestic Council[261] but were assisted in their work by various Federal agencies. Agencies could be asked to do staff work for the Council by conducting research or writing issue papers. On occasion, agency staff were detailed to the Council to assist in its functions. For example, in May 1976 the Immigration and Naturalization Service of the Department of Justice was doing a study for the Council to ascertain how many illegal aliens were in the country, what kinds of jobs they held, and where they lived.[262] Similarly, at the request of the Domestic Council, the Department of Health, Education, and Welfare, conducted a study on alternatives to busing as a means of achieving school desegregation.[263]

As under the former administration, the Domestic Council continued to draw upon committees for accomplishing some of its work.[264] For example, the President established a Domestic Council Committee on Illegal Aliens to "develop, coordinate and present. . .policy issues that cut across agency lines to provide better programs for dealing with this National problem."[265]

The Ford administration was the first to make permanent civil rights assignments to Domestic Council staff. As of April 1976, there were three Associate Directors on the Domestic Council with responsibilities relating to minority and women's affairs: the Associate Director for Housing, Community Affairs, and Communication, the General Counsel and Associate Director of Justice, Civil Rights, and Drug Abuse, and the Associate Director for Transportation.[266] None had full-time civil rights duties. The General Counsel and Associate Director for Justice, Civil Rights, and Drug Abuse appeared to be the focal point in the White House for a broad spectrum of civil rights issues. He coordinated White House activities on HEW's proposed Title IX regulations, alternatives to busing, sex discrimination in athletics, and affirmative action.[267]

Despite its broad range of activities, the Domestic Council did not systematically seek remedies for deficiencies in existing civil rights legislation or patterns of nonenforcement of civil rights laws. Indeed, if an issue did not create a crisis and was not forced by a deadline external to the Council, it merited little of the Council staff's attention. According to the Associate Director for Civil Rights, staff civil rights activities most frequently took place in response to problems that developed day-to-day and to action forcing events, such as pending legislation.[268] For example, Council staff conducted a review of busing as a means to desegregate schools, in response to events in Boston and other cities;[269] its review of HEW's proposed Title IX regulation was in response to the requirement in Title IX of the Education Amendments of 1972 that the President sign HEW's regulation;[270] and its interest in voting rights was stimulated by pending amendments to the Voting Rights Act of 1965.[271]

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[260] This position was held by Richard D. Parsons, who came to the White House in March 1975 from the Vice President's office. For a discussion of Mr. Parsons' background and duties, see, "Dick Parsons: Defining Professional Turf," *Washington Post*, Feb. 25, 1976.

[261] For example, at the time of Commission staff interviews, the Associate Director for Civil Rights, Justice, and Drug Abuse had one staff assistant. The Associate Director for Housing, Community Affairs, and Communication had none.

[262] May interview, *supra* note 88. See sec. II(B) *supra* for further discussion on illegal aliens.

[263] Administration efforts to achieve school desegregation are discussed in sec. VI(C) *infra*.

[264] The role of Domestic Council committees is discussed in pt. A, sec. IV, *supra*.

[265] 11 *Weekly Compilation of Presidential Documents* 26 (Jan. 13, 1975). Another example is the Domestic Council Committee on the Right to Privacy established by President Nixon, with then Vice President Ford as Chairman. The Committee members included the Secretaries of the Treasury, Defense, Commerce, Labor, and Health, Education, and Welfare; the Attorney General; the Chairman of the Civil Service Commission; and Directors of the Office of Management and Budget, Office of Telecommunications Policy, and Office of Consumer Affairs. When Nelson Rockefeller became Vice President, President Ford named him as Chairman. 6 *National Journal Reports* 1521-23 (Oct. 12, 1974).

[266] These positions were held by F. Lynn May, Richard D. Parsons, and Judith Hope, respectively.

[267] Interview with Richard D. Parsons, General Counsel and Associate Director, Civil Rights, Justice, and Drug Abuse, Domestic Council, The White House, Dec. 30, 1975. His other responsibilities included work on criminal and civil justice, law enforcement, and drug abuse.

[268] Parsons interview, *supra* note 261. This tendency has been true of Council staff activities in all areas, not only in civil rights, although perhaps this may change. In early 1976, the *National Journal* quoted the Council's Deputy Director for Policy and Planning, Arthur F. Quern, as stating, "We are going to put emphasis on issues not of immediate urgency." 8 *National Journal Reports* 244 (Feb. 21, 1976).

[269] School desegregation is discussed in sec. VI(C) *infra*.

[270] 20 U.S.C. §§1681-86 (Supp. V, 1975). Title IX states that: ". . .no such rule, regulation, or order shall become effective unless and until approved by the President. . . ." 20 U.S.C. §1682 (Supp. V, 1975).

[271] Voting rights legislation is discussed in secs. II(A) and II(B) *infra*.

V. INFORMATION-GATHERING AND MONITORING SYSTEMS

For the President to ensure that civil rights laws are being carried out by Federal agencies, uniformly and effectively, there must be a system for gathering accurate and up-to-date information on the extent to which equal opportunity has become a reality across the Nation and the adequacy of Federal agency civil rights activity to protect the rights of minorities and women.[272] Yet, the Ford administration White House did not regularly and systematically solicit reports from Federal agencies which included statistics and facts on the status of equal opportunity for minorities and women. It did not regularly gather information on the adequacy of Federal agency civil rights enforcement programs. Instead, White House information gathering was intuitive and ad hoc.

A. The Status of Equal Opportunity for Minorities and Women

The White House made some attempt to inform itself on how minorities and women perceived their own status. This was done through a series of frequently scheduled meetings between various segments of the public and administration officials. These meetings, which were held for the broad purpose of communicating with the public on many issues and not only civil rights, were of several types, including public forums, field conferences, and "Tuesdays and Wednesdays at the White House."

Public forums of domestic policy were conferences sponsored by the Domestic Council. They covered four major areas: economy, resource development, social policy, and community building. They were held in six major cities throughout the United States.[273] The forums consisted of 1-day meetings where public witnesses presented testimony on major policy issues. The White House reported that the opinions represented at these forums came "from welfare recipients to mayors and governors; from Indians, the clergy, blacks, Spanish speaking Americans, housewives [sic] and senior citizens to industrialists, labor leaders, bank presidents, environmentalists, doctors, lawyers, state and local officials. And many more. . . ."[274]

White House field conferences, often organized by Office of Public Liaison (OPL) staff members, were also held in major cities throughout the United States. These conferences were described as ". . .elaborately structured affairs at which Cabinet and White House officials speak on areas of responsibility and conduct discussion panels. . . ."[275] They were primarily designed to promote better understanding between Federal officials and local citizen and industry groups. Special assistants and other White House staff were asked to provide lists of possible attendees and were often participants at such meetings.

"Tuesdays at the White House" were large, issue-oriented affairs that provided an opportunity for organizations involved in an issue to make their views and concerns known to policymakers.[276] These meetings were not necessarily held on Tuesdays, but could have been held on any day from Monday to Saturday. OPL staff members invited people from around the country who were involved in an issue to meet with the administration officials also working on that issue.[277]

OPL staff also arranged meetings with the President to discuss a current critical issue. The Special Assistant for Human Resources arranged a meeting between representatives from the Oglala Sioux reservation and Department of Justice officials, which the President briefly attended.[278] The former Special Assistant for Minority Affairs arranged meetings between the President and representatives of major civil rights groups, including the National Urban League and the National Association for the Advancement of Colored People (NAACP). According to Mr. Scott, more black leaders met with

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[272] The need for such a system is discussed in pt. A, sec. III *supra*.

[273] Conferences were held in Denver, Colo. (Oct. 21, 1975); Tampa, Fla. (Oct. 29, 1975); Austin, Tex. (Nov. 11, 1975); Philadelphia, Pa. (Nov. 18, 1975); Indianapolis, Ind. (Nov. 25, 1975); and Los Angeles, Calif. (Dec. 9, 1975). Letter from Nelson A. Rockefeller, Vice President, to Gerald R. Ford, President, Dec. 15, 1975, transmitting, "Report to the President, White House Public Forums on Domestic Policy." 11 *Weekly Compilation of Presidential Documents* 1377 (Dec. 17, 1975).

[274] *Id*.

[275] 6 *National Journal Reports* 1919 (Dec. 21, 1974). As of October 1975, 14 field conferences has been held in as many U.S. cities. 7 *National Journal Reports* 1492 (Oct. 25, 1975).

[276] In addition, there were Wednesday meetings which were small, industry-oriented affairs. These meetings were informal and provided an opportunity for business associations to meet with administrative officials to discuss a particular subject. Lindh interview, *supra* note 8.

[277] Meetings were held concerning such subjects as energy resources, women in athletics, women in the military, employment of the handicapped, and the role of the Federal Government in health, bilingual education, and employment concerns of Asian Americans. One meeting was held on affirmative action. Federal Women's Program coordinators, the head of the Equal Employment Opportunity Commission, and more than 30 agencies participated. A meeting was also held on census concerns of ethnic Americans. Michael Novak, author of *The Rise of the Unmeltable Ethnics*, was the main speaker.

[278] 1975 Marrs interview, *supra* note 8. See also sec. II(D) *supra*.

President Ford in 14 months than had been in the Oval Office in 8 years.[279]

OPL staff members appeared to have differing views on the value of these various meetings to the policymaking process. For example, the Special Assistant for Human Resources noted that concerns expressed at these meetings had an influence on decisionmaking.[280] The former Special Assistant for Minority Affairs viewed these meetings of little utility compared with other activities on behalf of black persons.[281]

B. The Adequacy of Civil Rights Enforcement

Neither White House staff nor Domestic Council staff had mechanisms for systematic review of the Federal enforcement of civil rights laws and the execution of Federal civil rights policy. However, White House staff members had developed ad hoc systems for gathering some information. For example, the former Special Assistant for Hispanic Affairs maintained a tracking system with each agency head on major issues. He also received all internal public documents on Spanish-speaking concerns from the Departments of Labor, Commerce, and Health, Education, and Welfare. The former Special Assistant also received and transmitted information by serving on interagency committees.[282] The former Special Assistant for Minority Affairs requested that Cabinet and agency heads name a liaison or contact person to inform him on internal employment activities, especially regarding blacks.[283]

In addition, the Domestic Council reviewed this Commission's reports, including those on the *Federal Civil Rights Enforcement Effort* . This was the first administration to review regularly this Commission's reports, although pursuant to its legal mandate[284] this Commission had routinely submitted its reports to the President. When these reports were received by the White House, they were sent to the Federal agencies concerned. After agencies were given an opportunity to comment on the reports, Domestic Council staff prepared a report to the President based on agency responses.[285] According to the Associate Director for Justice, Civil Rights, and Drug Abuse, the purpose of this process was to summarize the substance of the Commission's recommendations and assure that they were comprehensively assessed. He stated that as a result of these reviews, the Council staff were preparing a series of memoranda to the President with recommendations to improve the Federal civil rights effort. The Associate Director for Justice, Civil Rights, and Drug Abuse declined to share these memoranda with Commission staff or to state what recommendations were made to the President.[286]

However, the Associate Director indicated that Domestic Council staff did not have the resources to conduct an indepth evaluation of agency comments on Commission reports before preparing their own reviews.[287] Moreover, these staff members were not necessarily experts on the topics covered by the reports. Rather, they were people with day-to-day assignments in a variety of areas.[288] Council staff did not supplement their knowledge by consulting Commission staff and other civil rights experts.

Thus Council staff reviews of Commission reports and agency responses might have been superficial. For example, *The Federal Civil Rights Enforcement Effort—1974, Vol. II, To Provide. . .For Fair Housing* was sent to the Department of Housing and Urban Development (HUD) for comment on the chapter in that report pertaining to HUD. The Associate Director for Housing and Community Affairs stated that HUD's response was a comment to the effect that the report was out of date by 1 year and that HUD had made considerable progress during the past year.[289] This was an insufficient response to this Commission's report, however. Although time elapsed between the issuance of the report and its review by HUD, many of the report's findings continued to be true even in February 1976, more than 18 months after the report was published.[290] Nevertheless, Domestic Council staff were not fully informed as to the deficiencies in HUD's enforcement of Title VIII of the Civil Rights Act of 1968[291] and did not challenge HUD's negative response.

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[279] Scott interview, *supra* note 23.

[280] 1975 Marrs interview, *supra* note 8. The former Special Assistant for Women's Affairs also regarded these meetings as important. Lindh interview, *supra* note 8.

[281] Scott interview, *supra* note 23. For a discussion of White House activities regarding blacks, see pt. A, sec. II(A) *supra* and pt. B, sec. II(A) *supra* .

[282] DeBaca interview, *supra* note 8.

[283] Scott interview, *supra* note 23.

[284] See 42 U.S.C. §1975c(b) (Supp. V, 1975).

[285] Parsons interview, *supra* note 261.

[286] *Id* . He indicated that these reports were in the nature of working documents and, as such, were not appropriate for public view. In January 1976, Commission staff wrote to the Associate Director for Civil Rights and Drugs, asking for information on "The actions taken by the White House on recommendations made in Commission reports issued during the Ford administration." Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Richard D. Parsons, General Counsel and Associate Director, Domestic Council, Jan. 7, 1976. No written response was received by Commission staff, although on Jan. 22, 1976, the Associate Director did state, over the telephone, that the material was not yet prepared. As of January 1977, it had not been received.

[287] Parsons interview, *supra* note 261.

[288] *Id* .

[289] May interview, *supra* note 88.

Reports transmitted to the President by the Commission on Civil Rights were routed to the Domestic Council but were not adequately circulated to White House staff, even when they were pertinent to a project that staff might have been working on. For example, when the Commission sent a copy of its report on the Voting Rights Act[292] to the White House, the former Special Assistant on Hispanic Affairs did not receive a copy from the Domestic Council, although he was at that time serving on a task force to study the proposed extension of the Voting Rights Act to include persons of Spanish origin.[293]

The former Special Assistant for Women regularly received Commission reports, but only because, on her own initiative, she requested to be on the Commission's mailing list. She apparently did not routinely receive nonpublished material sent by the Commission to the White House. In November 1975, this Commission wrote to the President recommending that he issue an Executive order prohibiting sex discrimination in all federally assisted programs.[294] At the same time, the former Special Assistant for Women was working on a proposal to expand Title VI of the Civil Rights Act of 1964 to include sex. The Commission's letter, however, was not brought to her attention. She also was not made aware of correspondence on abortion between the U.S. Commission on Civil Rights and the White House,[295] although she was working on the same issue.[296]

The real test of the adequacy of the Council staff's reviews lies in the extent of Presidential effort to remedy the deficiencies in Federal agency enforcement programs. There seems to have been little action in this regard. As of early 1976, this Commission, in reviewing the status of the recommendations it had made since 1972, did not find that there had been significant execution of its recommendations in the *Enforcement Effort* series.[297]

VI. POLICIES AND ACHIEVEMENTS

This section evaluates the extent of Presidential leadership in several areas of general importance to minorities and women: providing sufficient funding for the enforcement of Federal civil rights laws, supporting affirmative action to remedy the effects of past discrimination, assuring that there is fair housing for minorities and women, desegregating this Nation's schools in accordance with constitutional requirements, and providing equal business opportunities for minorities and women.

A. Budget for Civil Rights

The amount of money in the Presidential budget for civil rights enforcement and the items for which it will be spent are indicative of the extent to which the enforcement of civil rights laws is a Presidential priority.[298] In the words of President Ford:

> The Budget of the United States is a good road map of where we have been, where we are now, and where we should be going as a people. The budget reflects the President's sense of priorities. It reflects his sense of competing interests. And it reveals his philosophy of how the public and private spheres should be related.[299]

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[290] HUD's approach to the prevention and elimination of housing discrimination was largely ad hoc. It conducted few communitywide pattern and practice compliance reviews. See U.S. Commission on Civil Rights, *Interim Report on the Status of Commission Recommendations made from 1972 to 1975* 65 (February 1976).

[291] 42 U.S.C. §3601 *et seq.* (1970).

[292] U.S. Commission on Civil Rights, *Using the Voting Rights Act* (April 1976).

[293] DeBaca interview, *supra* note 8.

[294] Flemming letter, Nov. 12, 1975, *supra* note 195. White House activities with regard to sex discrimination are discussed in sec. II(E), *supra*.

[295] Letter from the Commissioners, U.S. Commission on Civil Rights, to the President, June 10, 1975; and letter from Richard D. Parsons, Associate Director and Counsel, Domestic Council, the White House, to Arthur Flemming, Chairman, U.S. Commission on Civil Rights, July 16, 1975.

[296] Lindh interview, *supra* note 8.

[297] *Interim Report on the Status of Commission Recommendations, supra* note 290.

[298] Staff of the Brookings Institution, an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences, stated: "In any year the budget is the single most important expression of the Nation's priorities. . . ." B.M. Blechman, E.M. Gramlich, R.W. Hartman, *Setting National Priorities, the 1976 Budget* (1975).

[299] President Ford, "Fiscal Year 1977 Budget Message of the President to The Congress of the United States," *United States Budget, Fiscal Year 1977, Budget in Brief* at 3. Data and analysis relating to the budget are published in four documents: *The Budget of the United States Government; the Budget of the United States Government—Appendix: Special Analyses, Budget of the United States Government*; and *The United States Budget in Brief.* [Hereinafter these documents are referred to, by fiscal year, as *Budget; Budget Appendix; Special Analyses*; and *Budget in Brief*, respectively.] The data in this section are largely taken from the *Special Analysis on Civil Rights Activities.* This *Special Analysis* like the other *Special Analyses* was prepared by OMB staff after the basic budget decisions had been made. See ch. 2, *infra,* for a further discussion of the preparation of this *Special Analysis*.

For fiscal year 1977,[300] the budget for civil rights enforcement was estimated at $430 million.[301] Civil rights enforcement accounted for more than 10 percent of the total Federal budget for law enforcement and justice.[302]

The fiscal year 1977 budget for civil rights enforcement represented an increase of $32 million, almost 8 percent, over the projected figure for 1976.[303] It also represented an increase of $138.4 million, almost 50 percent more than was spent during fiscal year 1974 which was the last full fiscal year of the Nixon administration.

In evaluating this increase for civil rights enforcement, it is important to note that throughout the entire Federal budget there were few other increases. The President's key emphasis in the fiscal year 1977 budget was to reduce inflation. He tried to reverse a "long term trend" of Federal spending growth.[304] Spending increases were made only where absolutely necessary, and outlays were projected to decrease in a number of areas including agriculture, community development, education, and training.[305] Thus, this Commission commended President Ford for recommending increased outlays for civil rights enforcement.[306]

It is also important to note, however, that the projected $430 million civil rights enforcement budget for fiscal year 1977 did not reveal an increased Federal emphasis in this area. Rather, it appeared to reflect a solid commitment to continue the level of effort from fiscal years 1975[307] and 1976. The 1977 budget for civil rights enforcement was one which enabled the Government to maintain that level of effort during a period of inflation.

In 1977, civil rights enforcement was projected to comprise .11 percent of the total budget, as it did in fiscal year 1974 and 1975, and as it was estimated for fiscal year 1976.[308] Moreover, as shown in exhibit 1.4, the recent increases did not extend the level of funding for civil rights enforcement when price level was held constant. For example, using 1969 prices, the projected 1977 budget for civil rights enforcement amounted to $228 million.[309] It amounted to less than the 1973 budget, which, in terms of 1969 prices, was worth about $237 million.

The fiscal year 1977 budget did not indicate that civil rights enforcement was a Presidential priority, even relative to other areas of spending. Federal agencies were not instructed that their budgets should reflect the President's concern for civil rights,[310] although such instructions had been used in the Nixon administration.[311] Civil rights enforcement was not mentioned in the President's 1977 budget message to Congress.[312]

Not all of the money in the budget for civil rights enforcement was actually to be used for civil rights enforcement activities.[313] Almost $80 million, nearly

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[300] Through June 1976, fiscal years ran from July 1 of one year through June 30 of the next. Thus, for example, fiscal year 1974 began on July 1, 1973, and ended on June 30, 1974. The Congressional Budget and Impoundment Control Act of 1974 established new congressional budget procedures and a new fiscal year period, from October 1 through September 30, beginning with fiscal year 1977. To bridge the period from July 1, 1976, to Sept. 30, 1976, known as the transition quarter, a special budget was prepared for this 3-month period. Data for the transition was given, along with data for fiscal years 1973-1977, in exhibit 1.6 *infra* . Commission staff anlaysis of the transition quarter budget for civil rights revealed no funding patterns for civil rights which were significantly different from those in the fiscal years 1976 and 1977 budgets. Thus, the transition quarter budget will not be discussed here.

[301] *1977 Special Analysis* at 231.

[302] Outlays for law enforcement and justice for fiscal year 1977 were estimated at $3.4 billion. *1977 Budget in Brief* at 57.

[303] *1976 Special Analysis* at 210.

[304] President Ford proposed to cut the rate of Federal spending growth to 5.5 percent a year, half the average growth rate in the last 10 years. *1977 Budget in Brief* at 4.

[305] *Id* . tables 2 and 4, and 57 and 59-63.

[306] U.S. Commission on Civil Rights, "Statement for Fiscal Support for Civil Rights Activities," Feb. 10, 1976.

[307] Those who, over the years, had closely followed the budget figures for civil rights enforcement might be aware that the actual outlays in fiscal year 1975 were far less than the $603.84 million proposed for that year. (*1975 Special Analysis* at 172.) This decrease appeared to be due, not to a lessening of commitment but rather to a change in the methods used to prepare the *Special Analysis* . There was $242 million for emergency school assistance programs included in the fiscal year 1975 estimate for civil rights enforcement. In the fiscal year 1976 and 1977 budget, funds for this program were included under minority assistance programs, rather than enforcement, since OMB had, correctly, counted these funds as being used for grants rather than enforcement.

[308] The percent of the total budget allocated for civil rights enforcement decreased since 1972 and 1973 when this Nation spent .13 percent of its budget in this area.

[309] Due to inflation, on the average, it would take $188.43 to purchase the amount of goods and services in 1977 which would have been purchased for $100 in 1969. Conversely, the goods and services which $100 will be able to purchase in fiscal year 1977 would be worth, on the average, only $53.07 in terms of 1969 prices. Thus, a 1977 budget of $430 million would be able to fund a program which could have been funded for $228 million in fiscal year 1969. See exhibit 1.4 for the value, in terms of 1969 prices, of budgets for civil rights enforcement for fiscal years 1971-1977.

[310] Each year Federal agencies were instructed to select major objectives according to criteria delineated in OMB Circular No. A-11. In fiscal year 1977, civil rights was not mentioned as one of the major objectives. For a discussion of Circular No. A-11, see ch. 2, *infra* .

[311] See, for example, Transmittal Memorandum No. 38 to Circular No. A-11, revised, to Heads of Executive Departments and Establishments, "Preparation and Submission of Annual Budget Estimates," June 21, 1971.

[312] Gerald R. Ford, "Budget Message of the President, Jan. 21, 1976," reprinted in *1977 Budget in Brief* 3-6. Civil rights was also not mentioned in the State of the Union Message, although in December 1975, one Presidential aide indicated to Commission staff the expectation that the State of the Union Message would discuss plans for improving Federal civil rights enforcement.

[313] It should be noted that the Ford administration made a special effort to make clear the amount of money spent on civil rights enforcement activities as distinguished from money spent for assistance for minorities. Previously, the *Special Analyses for Civil Rights* grouped both categories of expenditures under the category of "outlays for civil rights activity," creating the impression of an inflated civil rights budget. Minority assistance was not

20 percent of that budget, was to be spent on upward mobility,[314] which is also an important Federal effort.

The upward mobility program is designed to improve the advancement opportunities of employees in lower grades through on the job and classroom training. The upward mobility program cannot be characterized as a civil rights enforcement program, despite its classification in the budget. Rather, it is an assistance program. Participation is open to all qualified persons and is not limited to minorities and women. This program was included in the civil rights enforcement budget because the Equal Employment Opportunity Act of 1972, which prohibits employment discrimination, provides for its establishment.[315]

More significantly, the dollar amount projected for civil rights enforcement in fiscal year 1977 was not adequate. This can best be seen by examining the components of the budget for civil rights enforcement. The programs encompassed by that budget are listed with their allocations in exhibit 1.6.

Expenditures in the category of enforcement and investigation were to be primarily for the purpose of ensuring nondiscrimination in federally assisted programs, including enforcement of Title VI of the Civil Rights Act of 1964[316] and the nondiscrimination provision of the State and Local Fiscal Assistance Act of 1972. Expenditures for enforcement and investigation were not substantial under the Ford administration. For fiscal year 1977 only $27 million was to be spent in this category, which was considerably less than the $44 million spent in 1972, the highest level of funding in this category under the Nixon administration. Although this decrease might have, at least in part, been due to changes in the method of budget preparation rather than in actual expenditures,[317] the total amount in this category was still very small. This Commission's findings concerning the civil rights compliance program under the State and Local Fiscal Assistance Act, and its recommendations for expanding this program, illustrate the inadequacy of Federal expenditures in the category of enforcement and investigation.[318]

The category of fair housing was another area in which expenditures were totally inadequate,[319] even though expenditures in this category had more than doubled, from $7.5 million in 1971 to $18.1 million in 1977, an increase of $10.6 million. Only a small portion of these funds, $5.1 million, were to be spent by the Department of Housing and Urban Development to ensure fair housing for the Nation as a whole. Indeed, the Government planned to spend more, a total of $6.1 million, for the single purpose of assuring the rights of military personnel to nondiscriminatory off-base housing.[320]

Another major area in which this Commission found the Federal budget to be inadequate was in equal employment opportunity, the principal area of expenditure in the civil rights enforcement budget. Of the $430 million for civil rights enforcement that the Ford administration estimated would be spent in fiscal year 1977, $343 million or 80 percent, was projected to be spent for equal employment oppor-

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appropriately considered a civil rights activity, in that it was generally designed to compensate for the failures of Federal and federally assisted programs to reach minorities on an equitable basis. Expenditures for minority assistance were more appropriately grouped with other Federal and federally assisted programs. Neither administration provided information on the amount of money spent on assistance to women.

[314] This pattern of spending was not significantly different from that in recent years. See exhibit 1.5 *infra* for comparisons from 1973 through 1977.

[315] That act provides:

> each department, agency, and unit shall include, but not be limited to (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential. . . .42 U.S.C. §2000e-16(b)(3)(2) (Supp. V, 1975).

[316] More than 25 Federal agencies had responsibilities under Title VI. In November 1975, based on a review of seven of the largest of these agencies, this Commission concluded that these agencies had often neglected their principal duty under Title VI, to ensure nondiscrimination in the services offered by the programs they fund. *To Extend Federal Financial Assistance, supra* note 192, at 757.

[317] OMB reported that a decrease in expenditures for Title VI enforcement and investigation was shown between the years 1973 and 1974 because changes were made in the way budget data are evaluated. By current means of calculation, for example, 1973 enforcement and investigation figures for the Federal Bureau of Investigation were overstated. Moreover, in fiscal years 1974 and 1975, HEW funds for Title VI education enforcement were excluded from the enforcement and investigation category and added to the equal educational opportunities category. Likewise, HUD funds for Title VI enforcement were excluded from this category and added to the fair housing category. Interview with James B. Robinson, budget examiner for civil rights, OMB, Jan. 23, 1976.

[318] Responsibility for the overall administration of the State and local Fiscal Assistance Act of 1972 (31 U.S.C. §1221-64 (Supp. V, 1975) and 26 U.S.C. §§6017A and 6687 (Supp. V, 1975)) lies with the Office of Revenue Sharing of the Department of the Treasury. Yet in 1975, that office had only four full-time professionals to oversee civil rights compliance by 39,000 recipients. This Commission recommended that the Secretary of the Treasury delegate to agencies with overlapping duties, the responsibility for monitoring compliance under general revenue sharing and that the President request from Congress, for fiscal year 1976, an appropriation of $7.5 million to be used to provide at least 300 additional positions for such a compliance program. U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. IV: To Provide Fiscal Assistance* 136 (February 1975).

[319] The need for additional expenditures in the areas of fair housing is discussed in sec. VI(D) *infra*.

[320] The Department of Justice was to spend $2.1 million for developing, negotiating, and litigating Title VIII cases. The remaining $4.8 million was to be spent by other Federal agencies with this responsibility.

Exhibit 1.4

Budget Outlays for Civil Rights Enforcement 1971-1977 (in millions of dollars)

Fiscal Year	Outlays	Outlays in terms of Constant (1969) Prices*
1971	189.74	164.79
1972	292.73	236.99
1973	313.08	236.91
1974	291.43	204.84
1975	345.54	215.16
1976** (estimated)	398.32	228.56
1977** (estimated)	429.85	228.12

*Derived from the Implicit Price Deflector for Federal Purchases of Goods and Services. Supplied by Thomas Cuny, Fiscal Economist, Fiscal Analysis Branch, Budget Review Division, OMB, Feb. 18, 1976.

**The transition quarter is omitted.

Exhibit 1.5

Upward Mobility As a Percent of Total Federal Civil Rights Enforcement (in millions of dollars)

Year	Total Civil Rights Enforcement Outlays	Outlays for Upward Mobility	Upward Mobility as a Percent of Total
1973	313.08	37.00	11.8
1974	291.43	44.00	15.1
1975	345.54	60.00	17.4
1976* (estimated)	398.32	73.80	18.5
1977* (estimated)	429.85	79.30	18.4

*Transition quarter omitted.

Exhibit 1.6

Federal Civil Rights Enforcement Outlays by Program Category (in millions of dollars)

	Actual				Estimated	
FISCAL YEAR	1973	1974	1975	1976	T.Q.*	1977
Federal Service equal employment opportunities	95.89	117.83	145.62	173.43	44.90	187.66
Military services equal opportunities	32.51	37.78	37.50	40.48	12.83	40.10
Private sector equal employment opportunity	58.63	73.10	94.07	106.48	28.80	115.01
Equal educational opportunity	61.97	11.89	16.69	21.51	5.48	23.91
Fair housing	12.63	13.50	16.78	17.56	4.41	18.13
Enforcement and investigation	36.72	24.12	22.25**	24.53**	6.77**	26.73**
Program direction, research and information dissemination	7.38	9.02	9.05	10.50	3.29	14.17
Indian programs***	.71	.41				
Civil rights conciliation and prevention of disputes	6.64	3.79	3.57	3.84	.98	4.16
TOTAL	313.08	291.43	345.54	398.32	107.46	429.85

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*Transition quarter.

**Includes all Title VI efforts except some HEW and HUD activities, which are included in the categories of equal educational opportunity and fair housing, respectively.

***In fiscal years 1975-1977, this category was deleted because OMB staff determined that they could not accurately separate data on enforcement in Indian programs from data on assistance to Native Americans.

Sources:
1975 Special Analysis at 172, *1976 Special Analysis* at 210, and *1977 Special Analysis* at 231.

tunity in the military, Federal service, and private sectors.[321] There had been substantial increases in these three categories. Indeed, outlays for private sector employment opportunities increased $80 million, from $34 million in 1971 to $115 million in 1977. For example, of this $115 million, the Equal Employment Opportunity Commission (EEOC) alone spent $68 million to enforce Title VII, an increase[322] of $52 million from fiscal year 1971.[323] However, these increases did not begin to reach the minimum level needed.[324]

B. Affirmative Action

One issue of continuing priority to the White House was affirmative action.[325] Under Executive Order No. 11246, as amended, Federal contractors were required to develop affirmative action programs to ensure equal employment opportunity for minorities and women.[326] The standards for these programs were set forth in Revised Order No. 4 of the Office of Contract Compliance Programs. These standards apply to Federal contractors in all industries except those where contracts are for construction. Nevertheless, the issue which concerned the White House, broadly stated, was how or even whether the requirements of Executive Order 11246, as amended, and Revised Order No. 4[327] should be applied to institutions of higher education.

White House interest in the issue demonstrated sympathy with those who were resistant to complying with civil rights laws. It was spurred largely by academic institutions themselves who were resistant to the requirements of Executive Order 11246. The institutions believed that academic employment was unique and that the requirements of the Executive order should have been modified for institutions of higher education.[328] This Commission has stated its position: "The principles of affirmative action, as amended in Revised Order No. 4, should be applied to colleges and universities and enforced according to existing Executive order regulations."[329]

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[321] This figure included the almost $80 million to be spent for Federal civil service upward mobility programs.

[322] This increase resulted, not primarily from policymaking decisions, but rather from additional duties required by the Equal Employment Opportunity Act of 1972.

Completed investigation of employment discrimination complaints increased from 7,320 in fiscal year 1971 to an estimated 60,256 in fiscal year 1977. It is estimated that EEOC and State and local agencies to which EEOC defers charges will resolve 80,500 charges in 1977, and that 82,532 persons will receive $159 million in cash benefits. *1977 and 1976 Special Analysis* . For a detailed discussion of enforcement activities by EEOC, see *To Eliminate Employment Discrimination, supra* note 247.

[323] In addition, Federal agencies responsible for implementing Exec. Order No. 11246, "Equal Employment Opportunity," 3 C.F.R. 173 (1973), were to spend $39.6 million in 1977. The Department of Justice was to spend $1.5 million to enforce Title VII of the Civil Rights Act and the Department of Labor was to spend $4.1 million in administering the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1970). The remaining $1.8 million was to be spent by regulatory agencies, such as the Federal Communications Commission, that have equal employment opportunity responsibilities. *1977 Special Analysis* at 233–36.

[324] In July 1975, this Commission recommended that resources in the area of employment be doubled. *To Eliminate Employment Discrimination, supra* note 247, at 649–54. It should be noted that the Commission does not support unlimited budget increases for civil rights enforcement. Effectiveness in this area could also be facilitated through administrative improvements. For example, in response to the Department of Health, Education, and Welfare's proposed consolidated procedural rules for enforcing civil rights laws, this Commission suggested a basic compliance scheme which it believed would enable that agency to vastly increase its workload with its current resources. U.S. Commission on Civil Rights, *Comments on Proposed HEW Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities* (July 1975).

[325] In a memorandum to heads of departments and agencies in March 1976, President Ford stated:

> . . .more is required than non-discrimination and prohibition of discriminatory practices. What is needed are strong affirmative actions to assure that all persons have an opportunity to compete on a fair and equal basis for employment and advancement in the Federal Government. Affirmative action includes recruitment activities designed to reach all segments of our society, fair selection procedures, and effective programs of upward mobility so that all employees have the opportunity to gain skills to enable them to compete for higher level positions. Such actions are under way in the Federal Government. They must be continued and expanded. Memorandum for Heads of Departments and Agencies from Gerald R. Ford, President, Mar. 6, 1975.

[326] Exec. Order No. 11246, 3 C.F.R. 1964–1965 Comp., pp. 339, 340, as amended by Exec. Order No. 11375, 3 C.F.R. 1966–1970 Comp., p. 684.

[327] Revised Order No. 4 (41 C.F.R. §60–2.1, *et seq.* (1975)). This order requires a utilization analysis of the employer's work force to determine if there are fewer minorities or women in each job category than would be expected by their availability for the job. If minorities or women are underutilized in any job category, the order requires the employer to take appropriate steps, including the development of numerical goals and timetables, to remedy the underutilization. Goals and objectives must be developed by job classification and organizational unit. Additional required elements of an affirmative action plan include, the development and implementation of internal auditing systems to measure the the effectiveness of the plan, the development or reaffirmation of an equal employment opportunity policy and dissemination of the policy, the development and implementation of "action oriented" programs (such as validation of tests and other selection techniques to assure their job-relatedness and elimination of barriers to minority and female recruitment), and support of outside programs designed to improve employment opportunities for minorities and women. For a fuller discussion of Revised Order No. 4, see U.S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* , February 1973 and *To Eliminate Employment Discrimination* , *supra* note 247, at 236.

[328] See, for example, Jan Vetter, "Affirmative Action in Faculty Employment Under Executive Order 11246," Sept. 16, 1974, Commissioned by the Administrative Conference of the United States. Professor Vetter stated in his report that the regulations applicable to nonconstruction contractors are "incapable of coherent application to institutions of higher education." The Administrative Conference, in its summary of Professor Vetter's report, stated:

> With respect to university faculty employment, for example, the regulations as applied have generated difficulties arising from failure to take account of the limited supply of qualified personnel in various disciplines, the nonquantifiablity of standards for academic personnel, the diversity of institutional needs fulfilled by academic personnel (e.g., research, teaching, public service), different types of institutions (e.g., research universities, community colleges), and the concept of peer review in academic employment practices. 40 *Fed. Reg.* 27926 (July 2, 1975).

[329] Statement by Arthur S. Flemming, Chairman, U.S. Commission on Civil

It is thus this Commission's view that special regulations were not necessary,[330] either for institutions of higher education or for other industries which claimed that their unique characteristics should have exempted them from Executive Order 11246.[331]

A disturbing factor in the White House role in attempting to resolve the problem was that it had not adequately consulted with those who disagreed with the academic institutions' position.[332] President Ford, White House staff, and several Cabinet members, including the Secretaries of Transportation, Labor, and Health, Education, and Welfare, met with a group of academicians.[333] Civil Rights groups which had been studying the problem were not invited to participate.

In addition, after the Secretary of Labor held fact-finding hearings in August and September 1975,[334] the Secretaries of Labor and Health, Education, and Welfare jointly announced a five-point equal employment opportunities plan. The plan included the establishment of an interagency advisory committee whose membership would include representatives of "academic and related areas, and [would] encompass faculty, administration, minorities, and women."[335] This committee was to "provide the government with continuing advice and recommendations on equal employment matters in higher education."[336] HEW selected the committee members. Again, the persons selected represented principally the opinions of university and college administrators.[337] It was only after strong protest from feminist organizations that representatives from the National Urban League and the National Organization for Women were added to the committee.[338]

As of July, 1976, the issue of whether the requirements of Executive Order 11246 should continue to be applied to institutions of higher education was not resolved. Thus, it was not known whether, or to what extent, institutions of higher education would be directed to comply with existing contract compliance requirements. However, there seemed to have

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Rights, before Fact-Finding Hearing Convened by the Secretary of Labor on the Implementation of Executive Order 11246 Affirmative Action Requirements as Applied to Employment at Institutions of Higher Education, Nov. 12, 1975. Chairman Flemming also stated:

> The Commission believes that much of the extended debate over affirmative action in higher education has been due to lack of acceptance within the academic community of the steps required to implement Title VII. Further attempts by the Government to provide a clearer explanation of affirmative action in the context of employment discrimination law might serve to diminish some of the current opposition to contract compliance regulations. *Id* .

[330] This Commission has suggested several steps which should be taken by HEW to assist institutions of higher education to overcome problems in complying with Exec. Order No. 11246. For example, HEW should provide data on Ph.D. and M.A. degree recipients, cross-tabulated by race, sex, and ethnicity. Where positions have been filled since 1972 by persons with a B.A. or M.A., data on recipients of these degrees should be used for determining availability. HEW should develop a mechanism for projecting the number of Ph.D. and M.A. recipients 2 years in advance. HEW should consider a mechanism for obtaining data on talent in Government and industry. *Id* .

[331] In attempts to become exempt from Executive order requirements, other industries, such as the skilled trades and protective services, raised the argument of their uniqueness. However, courts have consistently shown that the principles of the order do apply. Before a hearing convened by the Office of Federal Contract Compliance, a spokesperson for the Equal Employment Commission concluded:

> Now that the law has been extended to institutions of higher education we are told that the unique nature of their employment systems require modification of the legal principles. . . .It is precisely the lack of uniqueness in *the impact of their employment practices* that led Congress. . .to extend the statute to higher education. It is precisely this lack of uniqueness that leads us to urge that the principles of law be maintained. Peter C. Robertson, Director, Office of Federal Liaison, EEOC, Statement on Behalf of the Equal Employment Opportunity Commission at the Fact-Finding Hearing to Consider Employment by Institutions of Higher Education Under Federal Non-Construction Contracts, Oct. 7, 1975, at 43. [Emphasis in original.]

[332] In contrast, civil rights experts working on the issue considered the views of academicians. At the same time the President held his meeting, this Commission held a 2-day consultation on affirmative action in employment in higher education. The consultation was held Sept. 9 and 10, 1975, Representatives from the academic community and Federal agencies submitted their views. Two participants at the President's meeting also participated in the Commission's consultation. These were University of California professors Paul Seabury and Thomas Sowell.

[333] The meeting took place on Sept. 10, 1975, and the participants were: Secretary of Transportation William T. Coleman, Secretary of Labor John T. Dunlop, HEW Secretary David Mathews, Attorney General Edward H. Levi, and four university representatives: Kenneth J. Arrow of Harvard University, Cynthia Epstein of Queens College, City University of New York, Paul Seabury, University of California at Berkeley, and Thomas Sowell, University of California at Los Angeles. 11 *Weekly Compilation of Presidential Documents* 986 (Sept. 15, 1975).

[334] Fact-Finding Hearing on Employment by Institutions of Higher Education and Prime Contractors or Subcontractors Under Federal Nonconstruction Contractors, Aug. 20, 1975, and Sept. 30, 1975. 40 *Fed* . *Reg* . 30166 (July 17, 1975) and 40 *Fed* . *Reg* . 37129 (Aug. 25, 1975).

[335] Department of Labor, *News* , Jan. 2, 1976. The other four points in the joint programs included: a joint review of existing regulations as they apply to the institutions of higher education; a joint effort by both Secretaries to work with other public and private agencies on methods of increasing the supply of minorities and women qualified for academic employment; joint encouragement for higher education of internal grievance procedures to help resolve discrimination complaints; joint cooperation with other public and private agencies to develop improved data on availability of minorities and women for academic and other professional employment. See also, *EOHE* , Jan. 23, 1976, and *Women Today* , vol VI, no. 2 at 1 (Jan. 19, 1976).

[336] *News* , *supra* note 335.

[337] The original 10 members included: University of Michigan President Robben Fleming, chairman; Carnegie Council on Higher Education Associate Director Margaret Gordon; Princeton University President William Bowen; University of Notre Dame President Theodore Hesburgh (former Chairman of this Commission); University of Tennessee Associate Vice President Nebraska Mays; University of Alabama Business Professor Lena Prewitt; Texas A&M Graduate Dean George Kunce; Harvard University President Derek Bok; University of Oklahoma Legal Counsel Beverly Ledbetter; University of Texas Fine and Applied Arts Dean Jacinto Quierarte. *EOHE* , Feb. 16, 1976.

[338] Minority and women's rights groups criticized the original members because they were heavily biased in favor of the higher education establishment and would not be responsive to concerns of women and minorities. The two new members were Joan Wallace, deputy executive director of the National Urban League, and Mary Ellen Verheyden-Hillard, national coordinator of the National Organization for Women's Education Task Force. *EOHE* , Mar. 15, 1976.

been a move toward developing revised regulations which would have been applied only to institutions of higher education. The Federal Interagency Advisory Committee on Affirmative Action in Higher Education had debated proposed revisions to contract compliance regulations which would have applied to higher education.[339] In addition, the President's Task Force on Deregulation considered establishing a sub-task force to study affirmative action in higher education.[340]

Proposals to revise or reduce regulations for institutions of higher education were severely criticized by a number of proponents of affirmative action. In a recent report, the IWY Commission commented, "this is not the year to start dismantling the affirmative action regulations; rather it is the time to start enforcing them."[341] The White House, however, did not express such sentiments.

C. School Desegregation

Twelve days after President Ford assumed office, he signed into law the Equal Educational Opportunities Act of 1974,[342] commonly referred to as the Esch amendment.[343] The Esch amendment attempted to prohibit any United States court or Federal agency from requiring transportation of a pupil for the purpose of school desegregation under certain circumstances.[344] However, the negative impact with respect to the courts was somewhat mitigated by the inclusion of a provision that the amendment was "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the constitution."

Where pupil transportation was not prohibited, the Esch amendment specified that the transportation of students to achieve school desegregation was to be ordered only as a last resort. Certain other steps were to be taken first. These steps and the order in which they were to be considered[345] were: assigning pupils to suitable schools which are closest[346] to their homes, allowing pupils freedom of choice as to which school they attend, creating or revising attendance zones within the limits of transportation guidelines,[347] constructing schools, constructing or establishing magnet schools,[348] or other feasible action.[349] Even if a court determined that these steps did not work and that pupil transportation was necessary to achieve desegregation, the Esch amendment stipulated that courts could not require the transportation of students beyond the school which was "next closest" to their homes and provided the appropriate grade level and type of education.[350]

Both prior to and following the passage of the Esch amendment, it was determined that in a number of jurisdictions some of the remedies outlined in Esch, either in combination with each other or together with minimal busing, could have achieved an appropriate level of desegregation.[351] These results were obtained primarily in those geographical locations in which residential segregation was not so extensive and intense as to have made school transportation for the purpose of school desegregation necessary.[352]

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[339] *EOHE*, June 7, 1976.

[340] For a report on Presidential efforts for regulatory change see, 7 *National Journal Reports* 1078 (July 26, 1975). Rep. Shirley Chisholm, speaking before a general session at the First National Conference on Blacks in Higher Education, also expressed concern. She stated, "A trend which I find tremendously disturbing is a widespread and insidious national effort to undermine higher education opportunities through a shift in the administration of affirmative action requirements in higher education." She went on to say that ". . .special regulations. . .would seriously weaken the already inadquate enforcement of HEW's Office for Civil Rights." She also said: "A retreat in affirmative action. . .will result in fewer opportunities for graduate level education for black bachelor degree recipients [and] will result in fewer opportunites for higher education teaching and administrative roles once those students have completed their studies." *EOHE*, May 10, 1976.

[341] *To Form a More Perfect Union*, *supra* note 156, at 161. The IWY Commission recommended that:

> . . .the Department of Labor and all other Federal agencies monitoring the employment practices of Federal contractors be required to set up enforcement procedures with appropriate sanctions, and to use them without delay against contractors who exclude or discriminate against qualified people because of their sex. *Id*.

[342] Equal Educational Opportunities Act of 1974, 20 U.S.C. §1701 *et seq*. (Supp. V, 1975).

[343] This amendment was proposed by Congressman Marvin Esch in 1974.

[344] The Esch amendment prohibits any United States court or Federal agency from requiring transportation of a pupil if: 1) the pupil is to be transported to a school other than the closest or next closest which provides his or her grade level and educational needs; 2) the transportation poses a health risk or impinges significantly on the pupil's education; or 3) the transportation is being undertaken to compensate for residential shifts which have occurred after the school system has been judged by a court to be desegregated. 20 U.S.C. §1714, 1751–1758 (Supp. V, 1975).

[345] The amendment directs that the first step or combination of steps which achieves desegregation is to be implemented. *Id*.

[346] With regard to pupil assignment, specifically the amendment permits assigning students to the schools closest to their homes when distance is measured taking into account natural barriers. As a second option, the amendment permits assigning pupils to schools closest to their homes when distance is measured without taking such barriers into account. 20 U.S.C. §1713(a) and (b) (Supp. V, 1975).

[347] These steps are outlined in note 344 *supra*.

[348] A magnet school ranges from a full-time school with special academic programs to a center with programs which supplement basic academic skills taught in the regular classroom. Magnet schools are often used to attract students to desegregated schools. School districts use magnet schools as testing grounds for providing students with alternative programs in truly integrated settings. These schools typically require specific racial percentages which may parallel racial and ethnic groups in the school community.

[349] The Esch amendment also allows the development and implementation of "any other plan which is educationally sound and administratively feasible," subject to provisions of the amendment. 20 U.S.C. §1713(g) (Supp. V, 1975). The Esch amendment as written in 1974 included a provision that made clear that the amendment was not intended to modify or diminish the authority of the court to enforce fully the 5th and 14th amendments to the Constitution by holding it to the restrictions on pupil transportation in the 1974 Education Amendments.

The leadership Conference on Civil Rights said of this provision that it brought the first Esch amendment into conformity with the Constitution. The Leadership Conference on Civil Rights, Memorandum No. 4–76, Mar. 18, 1976. In 1976, another Esch amendment was proposed which would delete this provision. The Conference stated that the 1976 amendment was "designed to knock out any constitutional safeguards." *Id.*

[350] 20 U.S.C. §1714(a) (Supp. V, 1975).

In the majority of school desegregation cases, however, attempts to implement remedies outlined in Esch did not achieve substantial desegregation, and busing was subsequently ordered.[353] Thus, the courts found that in some instances nothing short of busing effected a meaningful level of desegregation.[354]

The courts were not alone in that conclusion. In comments on the Elementary and Secondary Education Act Amendments of 1974, this Commission stated ". . .there are situations where pupil transportation is the method that will effectively prevent students from being forced to attend segregated schools."[355] The Commission also said:

> . . .any statement, implying that as a matter of general principle dual school programs can be dismantled without busing is entirely without foundation in fact.[356]

The Department of Health, Education, and Welfare (HEW), too, in its efforts to develop effective alternatives to busing, found none. Nevertheless, HEW concluded that some methods, for example, pairing,[357] clustering,[358] and reorganizing grade structures, had in certain instances minimized the need for busing. Despite such findings, the Ford administration, which adopted an unequivocal opposition to desegregation by means of pupil transportation in August 1974,[359] adhered to its position.[360]

When questioned by members of the press about alternatives to busing, President Ford cited stricter adherence to the Esch amendment by the courts.[361] He also criticized courts for not following the Esch amendment.[362] However, the General Counsel of the Community Relations Service stated that in an extensive review of school desegregation cases around the country, he found no instances in which the courts handling those cases had not at least attempted to follow the standards set down in the Esch amendment or had ordered any unnecessary transportation of students.[363] President Ford also mentioned as alternatives to busing improvement of school facilities, lower pupil-teacher ratios, improvement of the neighborhood in which the school is located,[364] spending "whatever money is necessary" for magnet schools, upgrading teachers, providing greater freedom of choice, utilizing the neighborhood school concept, spending more money at the local level to upgrade schools in disadvantaged areas, and distributing housing[365] "so we achieve integration in a different way and you can still rely on the neighborhood school system."[366]

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[351] Desegregation was accomplished without significant amounts of pupil transportation in Beaumont, Tex., for example, and in a district in Brooklyn, N.Y. See memorandum from Joseph D. Rich, Deputy Chief, Education Section, Civil Rights Division, Department of Justice, to J. Stanley Pottinger, Assistant Attorney General for Civil Rights, Department of Justice, "Updated List of Districts with Court-Ordered Desegregation," Sept. 18, 1975.

[352] The Commission also remarked on cases in which schools have been desegregated without pupil transportation:

> Since the historic Brown decision in 1954, it has been demonstrated that in a good number of school districts, in some areas of the nation, that dual school systems can be dismantled without increasing the volume of transportation in terms of the number of students transported or the distance travelled. . . .In fact, our studies show that in some school districts, and in a few instances on a state-wide basis, both the number of students transported and distances travelled actually decreased as a result of desegregation. Letter from Arthur S. Flemming, Chairman; Stephen Horn, Vice Chairman; and Frankie M. Freeman, Robert S. Rankin, and Manuel Ruiz, Jr., Commissioners, and John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to the Honorable Carl D. Perkins, Chairman, Committee on Education and Labor, U.S. House of Representatives, June 10, 1974, [hereinafter referred to as Flemming letter to Perkins].

[353] See for example, Morgan v. Kerrigan, 401 F. Supp. 216, 264 (D. Mass. 1975), *aff'd* 523, F.2d 917 (1st Cir. 1975); and Newburg Area Council Inc. v. Board of Educ., Jefferson County and Haycraft v. Board of Educ., Louisville, Ky., C.A. Nos. 7045 and 7291 (W.D. Ky., Memorandum and Order filed July 30, 1975) at 2.

[354] The Supreme Court has recognized that in many cases effective desegregation could not take place without pupil transportation. It declared that ". . .desegregation plans cannot be limited to walk-in schools." Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 30 (1971).

[355] Letter from Arthur S. Flemming, Chairman; Stephen Horn, Vice Chairman; and Frankie M. Freeman, Robert S. Rankin, and Manuel Ruiz, Jr., Commissioners, and John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to the Honorable Harrison Williams, Chairman, Comm. on Labor and Public Welfare, United States Senate, May 6, 1974.

[356] Flemming letter to Perkins, *supra* note 352.

[357] Pairing is the combining of two schools so that their separate physical structures operate as a unit.

[358] Clustering is the combining of more than two schools so that their separate physical structures operate as a unit.

[359] For example, early in his Presidency, at a White House News Conference on Oct. 9, 1974, Mr. Ford expressed disagreement with the Boston court order. (This order is mentioned in note 375 *infra*). President Ford stated: "I have consistently opposed forced busing to achieve racial balance as a solution to quality education, and therefore, I respectfully disagree with the judge's order." 10 *Weekly Compilation of Presidential Documents* 1255 (Oct. 14, 1974).

[360] 11 *Weekly Compilation of Presidential Documents* 882 (Aug. 25, 1975); 921 (Sept. 8, 1975); 993, 997 (Sept. 22, 1975); 1040, 1049, 1050 (Sept. 29, 1975); 1160 (Oct. 20, 1975); 1213 (Nov. 3, 1975); 12 *Weekly Compilation of Presidential Documents* 109 (Feb. 9, 1976); and 533 (Apr. 12, 1976).

[361] 11 *Weekly Compilation of Presidential Documents* 992 (Sept. 8, 1975); and 109 (Feb. 9, 1976).

[362] 11 *Weekly Compilation of Presidential Documents* 1040, 1050 (Sept. 29, 1975); 1160 (Oct. 20, 1975); and 12 *Weekly Compilation of Presidential Documents* 533 (Sept. 12, 1976).

[363] Telephone interview with Hayden Gregory, General Counsel, Community Relations Service, Department of Justice, June 2, 1976.

[364] 11 *Weekly Compilation of Presidential Documents* 993 (Sept. 22, 1975).

President Ford stated that he opposed busing because it did not produce quality education.[367] He proposed these alternatives to busing, he said, because he believed that they were better tools for achieving quality education.[368] This Commission takes issue with this position.

First, if his principal concern were merely to achieve "quality education," he could have advocated actions such as lowering pupil-teacher ratios, upgrading the quality of teaching, and spending more money to upgrade schools in disadvantaged areas without describing them as "alternatives to busing." In fact, there would have been no need to mention them simultaneously with the question of school desegregation. Taking action to improve the quality of education is not incompatible with desegregating schools, and there is no reason that it should be treated as such. Second, if President Ford had seriously hoped to improve the quality of education in the Nation's schools, he should have allocated additional Federal funds for this purpose. He had not, however. Rather, the President proposed to spend 7 percent less for elementary and secondary education in fiscal year 1977 than was actually spent in fiscal year 1975,[369] in an inflationary economy, which effectively was to propose lower expenditures. He did not even propose sufficient legislation to accomplish the types of actions he exhorted school districts to undertake.

Further, President Ford did not recommend any means for accomplishing school desegregation. The alternatives to pupil transportation which he proposed were directed at improving the quality of education. They could not have served as substitutes for busing, which has been ordered by courts as a means to overcome unlawful school desegregation. Unlike pupil transportation, for the most part[370] the options proposed by the President did nothing to affect the racial and ethnic composition of schools which were unlawfully segregated. President Ford did not exercise sufficient leadership to encourage the Nation to desegregate its schools. According to the public record of Mr. Ford's statements,[371] it was not until February 1976 that he explicitly stated he believed desegregation was an important goal.[372] At that time he said:

> On the question of busing, the Supreme Court has tried to do two things: It has tried to provide quality education; it has tried to end segregation. Those are worthy objectives; I agree with that. The emphasis should be on ending segregation, but I think the Supreme Court, and our courts, particularly some courts, have used the wrong remedies and I vigorously oppose them.[373]

Moreover, this statement was made in the context of his opposition to busing. Indeed, a review of Mr. Ford's public statements reveals that his only statements indicating support of school desegregation were made in speeches and remarks opposing busing.[374] He failed to communicate to the public the fact that most busing to achieve desegregated schools resulted from the intentional segregation of those same schools by public officials.[375] He criticiz-

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[365] It is interesting, however, that as of July 1976, President Ford had not issued any policy statement urging stronger enforcement of fair housing laws. For further discussion concerning the White House record in that area, see sec. VI(D) *infra* .

[366] 11 *Weekly Compilation of Presidential Documents* 1231 (Nov. 3, 1975).

[367] 11 *Weekly Compilation of Presidential Documents* 921 (Sept. 8, 1975); 973, 997 (Sept. 22, 1975); 1040 (Sept. 29, 1975); 1160 (Oct. 20, 1975); and 12 *Weekly Compilation of Presidential Documents* 553 (Apr. 12, 1976).
It should be noted, however, that busing is not designed as a tool for improving the quality of education. Rather, its purpose is to achieve school desegregation.

[368] See, for example, 11 *Weekly Compilation of Presidential Documents* 993 (Sept. 22, 1975).

[369] Actual outlays for elementary and secondary educational programs were $5 billion in fiscal year 1975. The projected expenditures for fiscal year 1977 are $4.65 billion. *United States Budget , Fiscal Year 1977, Special Analysis I, Federal Education Programs* at 165.

[370] The one possible exception is the funding of magnet schools, which may affect the racial/ethnic composition of some schools within a district. See note 348 *supra* . Magnet schools, which can provide broad educational opportunities for students, have been criticized as an "escape route for whites assigned to predominantly black schools." G. Foster, "Desegregating Urban Schools: A Review of Techniques," 43 *Harvard Educational Review* 19 (February 1973).

[371] The search through the public record of Mr. Ford's statements was confined to the *Weekly Compilation of Presidential Documents* and the *Public Papers of the President* . These records are maintained by the National Archives and Records Service of the General Services Administration. They contain most of the President's public messages and statements, including those which the White House asked the National Archives and Records Service to record. They are not exhaustive. Some interviews and impromptu statements are not released by the White House for public record and therefore are not included.

[372] This statement was made on Feb. 20, 1976, during a question-and-answer session at a Dover, N.H., Chamber of Commerce breakfast. 12 *Weekly Compilation of Presidential Documents* 262 (Feb. 23, 1976).

[373] *Id.*

[374] For example, in August 1974, he stated, "I believe that all school districts, North and South, East and West, should be able to adopt reasonable and just plans for desegregation which will not result in children being bused from their neighborhoods." Office of the Federal Register, National Archives and Records Service, General Services Administration, *Public Papers of the President , Gerald R. Ford* 25 (1974).

[375] See note 371 *supra* . The Chairman of this Commission, with regard to early activities in the Boston school desegregation case, noted:

> The Federal executive branch . . failed to provide leadership in

ed courts which identified constitutional violations and ordered appropriate remedies, but he did not speak out against those who were responsible for segregated schools.

He did not make clear that local jurisdictions should have been held responsible for the segregation they created. He did not inform the public that desegregation works and can be greatly facilitated by local support.[376] Likewise, he did not commend the thousands of persons who worked hard to ensure that their school systems would become desegregated in accordance with the mandate of the Constitution as interpreted by the Supreme Court and that the transition from segregation to desegregation would be peaceable.[377]

Indeed, since President Ford actively sought to limit "busing for the purpose of achieving racial balance"[378] and since busing is the only known effective tool to accomplish school desegregation, it is the Commission's view that the President, in essence, hindered the progress of efforts to implement school desegregation.[379] To illustrate, in mid-May 1976 the President sought a curb on busing by directing the Attorney General to ask the Supreme Court to reconsider its rulings approving transportation as a means to achieve desegregation.[380] He also directed the Attorney General to explore the possibility of filing a friend-of-the-court brief with the Supreme Court, requesting it to overturn the Federal district court's order in the Boston school desegregation case.[381] The Staff Director of this Commission, in a speech presented to the National Education Association, made the following statement regarding the President's directive:

> If I were asked to indicate an act, in the area of civil rights, on the part of the Federal Government that would at one and the same time undermine obedience to the Constitution, endanger domestic tranquility, and set the civil rights movement back 22 years to an era prior to the *Brown* v. *Board of Education* decision, and insure the continuation of second class citizenship for all minorities in this Nation—not just blacks—I would say, have the Attorney General of the United States be successful in persuading the Supreme Court of the land to budge one iota from the stand taken by Judge Garrity in the Boston school desegregation situation.[382]

The Attorney General, however, declined to file a brief on the Boston school situation, although, as directed by the President, he continued an active search for a busing case which would be "suitable for judicial review of current case law on forced school busing."[383]

The President's directives may have suggested that if people continued or initiated resistance to school desegregation orders, the executive branch would have sympathized with that resistance and may have even attempted to intervene in their behalf. At the very least, the President's directives to the Attorney General may have fostered belief on the part of those who would resist court-ordered school desegregation that their position was somehow justifiable.[384]

In June 1976, the President proposed legislation "to improve the Nation's ability to deal with elementary and secondary public school desegregation."[385] The White House reported that the proposed legislation resulted from an 8-month study by the Depart-

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explaining and supporting both the Federal district court's decision that the Boston's School Committee had intentionally segregated Boston's public schools and the court's order requiring school desegregation. *Desegregation in the Boston Public Schools: A Crisis in Civic Responsibility* 209 (August 1975).

[376] See U.S. Commission on Civil Rights, *Desegregation of the Nation's Public Schools* (August 1976), for detailed support for this Commission's conclusion that desegregation is working and that supportive local leadership plays an important role in the desegregation process.

[377] For example, school desegregation was accomplished relatively smoothly in Charlotte, N.C., and Hillsborough County, Fla. Even where it was accompanied by violence, for example, in Boston and Louisville, most citizens involved put their effort into carrying out rather than obstructing the law.
In 1976, the President proposed legislation "to deal with elementary and secondary public school desegregation." This legislation acknowledged the contribution of individuals who have "anticipated the problems associated with desegregation and have organized to face and resolve those problems." Thus it gives credit to the role of those who experienced and overcame problems of desegregation. S. 3618, 94 Cong., 2d Sess. Statement of Findings §§(K) and (e), (1976). The proposed legislation did not, however, commend those who worked actively to achieve desegregation.

[378] 12 *Weekly Compilation of Presidential Documents* 969 (May 31, 1976). Note that courts did not order busing "to achieve racial balance" but rather to eliminate illegally segregated school systems. Mr. Ford's representation was therefore misleading.

[379] In its 1976 report on school desegregation this Commission commented on antibusing amendments proposed by Congress, President Ford's opposition to busing, and the Attorney General's intent possibly to seek Supreme Court review of certain aspects of busing. It stated, "The tragedy of these developments, and [others], is that they undermine the desegregation process in communities across the country. *Desegregation of the Nation's Public Schools*, *supra* note 376, at 14.

[380] Two of the earlier rulings which approved transportation as a means to achieve desegregation were: Green v. School Board of New Kent County, 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 25 (1971).

[381] 12 *Weekly Compilation of Presidential Documents* 969 (May 31, 1976).

[382] Speech by John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to the Conference on School Desegregation Without Turmoil, May 19, 1976, at the National Education Association, Washington, D.C.

[383] 12 *Weekly Compilation of Presidential Documents* 985 (June 7, 1976).

[384] This interpretation was made by the Leadership Conference on Civil Rights. Leadership Conference on Civil Rights, Memorandum No. 5-76, May 24, 1976.

[385] The White House, Fact Sheet, "The School Desegregation Standards and Assistance Act of 1976," June 24, 1976.

ments of Justice and Health, Education, and Welfare on "ways to minimize court-ordered busing."[386]

One positive feature of the legislation was a provision for a National Community and Education Committee to "assist, encourage, and facilitate community involvement in the school desegregation process."[387] Extensive research of this Commission in the area of school desegregation documented the critical importance of positive community leadership in promoting successful school desegregation. This provision if enacted might significantly contribute to the successful desegregation of the Nation's schools.[388]

Title I of the proposed legislation, however, could have impeded the process of school desegregation in this country. The proposed legislation would have set guidelines which would have required lower Federal courts to have determined precisely the degree to which existing school segregation was caused by the unlawful acts of educational officials. Such a standard ignored the dynamic relationship between school segregation and residential segregation[389] and would have required the courts to engage in a futile exercise of pseudo-precision.

The proposed legislation appeared to ignore or contradict contemporary constitutional standards regarding the legal significance[390] of a finding that school officials practiced *de jure* segregation with respect to a "meaningful portion" of a school system,[391] and that an inter-district desegregation plan might have been an appropriate and necessary remedy for school segregation in certain circumstances.[392] Further, the proposed legislation would have represented an unprecedented congressional encroachment on the Federal judiciary's exclusive authority to interpret the Constitution and to establish minimum standards of relief to remedy violations of fundamental constitutional rights.[393] The net effect of the proposed legislation would have been to narrow the definition of segregation and restrict the scope of remedies available to the courts. The Commission believes that it would be unwise to enact legislation that would rigidly prescribe legal standards controlling school desegregation. The rigid standards embraced in the proposed legislation would have robbed the Constitution of its living strength.

In summary, we note that President Ford stated that he had two objectives. He commented that his "fundamental objective" was "quality education."[394] Additionally, he said that he supported desegregation in this Nation's schools.[395] He provided encouragement for the courts to adopt his priorities, too, observing:

> I hope the Supreme Court. . .can give some better guidelines. . .to some of these lower Federal courts so that they can use a better judgment in trying to achieve, first, quality education and secondly, the ending of segregation and the protection of Constitutional rights.[396]

This Commission applauded President Ford's statements supporting school desegregation and shared his concern for ensuring that all pupils in this country have a high quality education. The Commission believes, however, that protecting the constitutional rights of pupils to a desegregated education must not be second to other educational priorities. Moreover, this Commission has reluctantly concluded that the sum total of President Ford's statements and actions did not show the strong support for either quality education or desegregation as he stated. Rather, the Commission's analysis indicates that his principal concern was to eliminate the use of pupil transportation for the purpose of school desegregation. It is our view that this concern is antithetical to the progress of school desegregation and the realization of equal protection of the laws for all children.

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[386] *Id.*

[387] *Id.* See Title II of (the proposed) School Desegregation Standards and Assistance Act of 1976. The Committee was to be "composed of citizens from a wide range of occupations and backgrounds, with particular emphasis on individuals who have had personal experience in school desegregation activities." *Id.*

[388] The Commission's views on the proposed legislation are set forth in a letter from Arthur S. Flemming, Chairman, for the Commissioners, U.S. Commission on Civil Rights, to Senator Edward M. Kennedy, Aug. 24, 1976. Slight modifications were recommended for the proposal for a National Community and Education Committee.

[389] School desegregation can facilitate and indirectly cause residential segregation. See Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 20–21 (1971).

[390] Once it is established that school officials have intentionally segregated a meaningful part of a school system, the burden of proof shifts to them to explain why any other racially disproportionate schools are not the results of the same or other intentional acts by school officials.

[391] Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 213 (1973).

[392] Milliken v. Bradley, 418 U.S. 717 (1974).

[393] Only the Supreme Court has the authority to interpret the Constitution, define constitutional rights, and determine the appropriate scope of relief to remedy violations of constitutional rights. Because state-imposed school segregation violates fundamental constitutional rights, Congress has no authority to establish standards and procedures to regulate the awarding of judicial relief in school desegregation cases. See, Katzenbach v. Morgan, 384 U.S. 641, 651 (1974).

[394] 12 *Weekly Compilation of Presidential Documents* 969 (May 31, 1976).

[395] 12 *Weekly Compilation of Presidential Documents* 952 (May 31, 1976).

[396] *Id.*

D. Housing

During the Ford administration, two major housing problems faced the Nation. One was an immediate and critical need for increased housing production to supply millions of dwellings to house low-income families and to meet the housing needs of the population in general. The other was the discrimination that continued to be an insurmountable barrier for many minorities and women in search of a decent place to live.

In January 1976, the housing task force to the Leadership Conference on Civil Rights said of the situation:

> The depressed housing industry did not regain its health last year. The ever rising price of new housing made home ownership and rental impossible for more and more Americans. Provisions for subsidized housing are almost at a standstill. So housing today is in short supply, over-priced, and still beset with discriminations that deny free choice of a place to live.[397]

These problems were not significantly different from those facing the country almost 2 years earlier when President Ford became President, or even at the time President Nixon took office in 1969.[398]

In April 1976, President Ford was asked to state his views on "open housing" and to indicate the steps the Federal Government should take to ensure "open housing."[399] He said:

> I would not use that term to describe any of my policies, period. I do feel that an ethnic heritage is a great treasure of this country, and I don't think that Federal action should be used to destroy that ethnic treasure.[400]

Mr. Ford's response implied that he believed Federal actions to ensure open housing might destroy this country's "ethnic treasure," potentially creating doubt about the wisdom of Federal action to ensure equal housing opportunities for all regardless of race, ethnic origin, or religion.[401] By focusing on the concept of "ethnic treasure," President Ford missed an excellent opportunity to inform the public of the extent of housing segregation in this country, the fact that self-segregation of racial ethnic groups seriously infringed on the rights of others to enjoy all the benefits of our society[402] and cannot be supported by official Government policy. He neglected to remind the Nation of the urgent need to provide equal housing opportunities to minorities and women by enforcing Title VIII of the Civil Rights Act of 1968.

As of July 1976, only one other major statement of housing policy had come from President Ford. In his 1976 State of the Union Message, President Ford stated that the fiscal year 1977 budget would "ask for additional housing assistance for 500,000 families," and commented that these programs "will expand housing opportunities, spur construction, and help to house moderate- and low-income families."[403] Unfortunately, this Presidential request to Congress fell far short of meeting the housing needs of the population, generally, and of the poor, in particular. According to the report of the President's Committee on Urban Housing, completed in late 1968, the United States goal for the decade 1968 through 1978 should be 26 million new and rehabilitated units, an average of 2.6 million additional units per year.[404] This goal included housing for all income groups, with 6 million of the 26 million units specified for low- and moderate-income families. The same goals were incorporated into the Housing and Urban Development Act of 1968.[405] However, in recent years the goal was not met.

As a result of inflation and a January 1973 moratorium placed on the federally subsidized housing program, housing construction fell from 3 million housing units in 1972 to approximately 1.7 million units in 1974.[406] During 1975, the housing industry across the Nation continued to suffer, and blacks were severely affected by the shortage of decent housing.[407] According to the National Urban League, the 1,161,500 units of housing started in 1975 was the lowest number in 30 years and below the average of 2.6 million necessary to meet the goals set by Congress in 1968.[408] As measured in May 1976, the annual production rate for 1976 was only 1.4 million units.[409] In order to meet a 2.6 million annual figure, President Ford's fiscal year 1977 request for additional housing assistance would need to have been for 1.2 million families, rather than 500,000.

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[397] Leadership Conference on Civil Rights, *L.C.C.R. Enforcement Report*, Jan. 26, 1976, at 9.

[398] See, for example, The Report of the President's Committee on Urban Housing, *A Decent Home* (Dec. 11, 1968) [hereinafter referred to as *A Decent Home*].

[399] The phrase "open housing" is frequently used interchangeably with the terms "fair housing" and "equal opportunity in housing."

[400] 12 *Weekly Compilation of Presidential Documents* 653 (Apr. 19, 1976).

[401] Although Title VIII of the Civil Rights Act of 1968 also requires equal housing opportunity regardless of sex (42 U.S.C. §3604-06 (Supp. V. 1975)), President Ford's remarks do not appear to have raised any questions with regard to this requirement.

[402] Residential segregation is a major contributor to school desegregation and seriously limits access to employment opportunities. For a discussion of the interaction between residential segregation and equal opportunity in other aspects of society, see U.S. Commission on Civil Rights, *Equal Opportunity in Surburbia* 9–15 (1974) and *Twenty Years After Brown, Equal Opportunity in Housing* 11 (1975) [hereinafter referred to as *Twenty Years After Brown*].

[403] 12 *Weekly Compilation of Presidential Documents* 46 (Jan. 26, 1976). The President's address was delivered before a joint session of the Congress, Jan. 19, 1976.

[404] *A Decent Home*, *supra* note 398, at 3.

[405] 42 U.S.C. §1441a (1970).

Moreover, based on the recommendations of the Presidential Committee of 1968 and the goals of the 1968 Act, at least 6 million more housing units should have been available for low-income families in 1978 than were available in 1968.[410] Since the country was seriously lagging behind in meeting that goal[411] and the housing market was recovering only slowly,[412] the size of President Ford's request demonstrated inadequate concern for the critical housing problems facing the Nation. In fact, his request for assistance for 500,000 families could have been for lower-income housing alone, in order to approach the goals established in 1968. With this housing shortage and the accompanying increases in the cost of housing, minorities and the poor would continue to be severely affected. Thus, the White House has not exercised the leadership essential for carrying out the national policies of providing fair housing throughout the country[413] and a "decent and suitable living environment for every American family."[414]

In the absence of any substantial Presidential policy statement on fair housing, Federal agencies relied on a June 11, 1971, statement by President Nixon which defined equal housing opportunity as "a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, or national origin."[415] This statement, while containing several positive features, distinguished between discrimination based on income and that based on race, color, religion, or ethnic origin. This distinction was severely criticized by civil rights groups and by this Commission as serving to reinforce the racially exclusionary practices and policies of many suburban communities.[416] According to the Domestic Council's Associate Director for Housing and Community Affairs, as of March 1976 former President Nixon's June 1971 statement was still Presidential policy. Moreover, there were no White House plans to issue another policy statement.[417] This lack of clear Presidential guidance as to the Nation's fair housing policy might have had the effect of slowing Federal agency fair housing actions.[418]

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[406] As a result of the moratorium alone, over 300,000 housing units were not built. For further discussion on the topic, see pt. A, sec. V(D) *supra*, and *Twenty Years After Brown*, *supra* note 402.

[407] The State of Black America, *supra* note 28.

[408] The Housing and Urban Development Act of 1968 set a goal of 26 million new housing units over a 10 year period, which could have been accomplished at the rate of 2.6 million per year. This Act is codified in various sections of 42 U.S.C.

[409] *Housing and Urban Affairs Daily*, June 17, 1976, at 143 [hereinafter referred to as *Housing and Urban Affairs*]; AFL-CIO position paper, June 8, 1976, signed by Andrew J. Biemiller, director, AFL-CIO Department of Legislation [hereinafter referred to as AFL-CIO position paper].

[410] *A Decent Home*, *supra* note 398, at 3; 42 U.S.C. §1441a (1970).

[411] See *Twenty Years After Brown*, *supra* note 402, at 33, and telephone interview with Eleanor Clagett, program analyst, Office of Fair Housing and Equal Opportunity, HUD, July 7, 1976. According to Ms. Clagett, this lag was reflected in the fact that from early 1973 through mid-1976, only approximately 500,000 new or rehabilitated housing units were added to the housing supply.

[412] See, e.g., *Housing and Urban Affairs Daily* and AFL-CIO position paper, *supra* note 409. Since January 1973, when President Nixon announced a moratorium on all federally assisted housing, the rate of new and rehabilitated housing for low-income families had not recovered. The moratorium and its effects are briefly discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. IV: To Provide. . .For Fair Housing*, at 71-73 [hereinafter referred to as *To Provide. . .For Fair Housing*] and pt. A, sec. V(D) *supra*.

[413] Title VIII of the Civil Rights Act of 1968 states "It is the policy of the United States to provide within written Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601 (1970).

[414] The Housing Act of 1949 states:

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. 42 U.S.C. §1441 (1970).

[415] *Public Papers of the Presidents of the United States: Richard Nixon, 1971* 730 (1972) [hereinafter referred to as *Public Papers*].

[416] This statement is discussed in pt. A *supra*.

[417] May interview, *supra* note 88.

[418] In February 1976, this definition of fair housing was included in a draft of a proposed interagency agreement which HUD circulated to 52 Federal agencies with fair housing responsibilities. Attachment to letter from Carla A. Hills, Secretary of Housing and Urban Development, and James H. Blair, Assistant Secretary for Fair Housing and Equal Opportunity. HUD officials stated that they used this definition because they wanted to include in this agreement some evidence that fair housing was a Federal priority. However, the statement was eventually removed from the agreement because it was antithetical to HUD policy under the Housing and Community Development Act of 1974. Statement by Jimmy Lee Sumpter, equal opportunity specialist, Office of Fair Housing and Urban Development, HUD, at a meeting of the Federal Equal Housing Opportunity Council, June 10, 1976.

A recent Supreme Court decision, *Hills* v. *Gautreaux* ,[419] may open the way to construction of low-income housing throughout metropolitan areas.[420] It makes clear that economic integration is a legitimate tool for strengthening housing opportunities for minorities, contrasting sharply with the policy statement issued by Mr. Nixon.[421] The *Gautreaux* decision thus strongly suggests that the President should provide a policy directive to the Nation, showing support for the principles upheld by the Supreme Court.

Although the nature of the housing problems facing the United States have not changed markedly during the 1970s, the legal framework for combating them has been substantially altered in the past 2 years. Most notably, the Housing and Community Development Act of 1974[422] contains a number of important provisions.[423] The act authorizes the Secretary of Housing and Urban Development to make housing assistance payments on behalf of low-income families,[424] and it requires each locality to submit a housing assistance plan as part of its community development block grant application.[425] The 1974 act, furthermore, amends Title VIII of the Civil Rights Act of 1968 by prohibiting sex discrimination in the sale or rental of housing.[426] It also provides that federally-related mortgage loans or insurance, guarantees, or other assistance cannot be denied to any person on account of sex and that the combined income of both husband and wife must be considered in extending mortgage credit.[427]

In addition, two other pieces of legislation were particularly important in the Ford administration. First, the Home Mortgage Disclosure Act of 1975[428] requires lending institutions to maintain data on the number and dollar amount of mortgage and home improvement loans which were originated or purchased by that institution, showing the location of each loan by census tract or zip code.[429] This act was designed to provide facts to citizens and public officials on the practices of "redlining," the refusal of financial institutions to grant mortgage loans to blacks and other minorities in certain areas.[430] Second, the Equal Credit Opportunity Act of 1974 forbids discrimination by creditors on the basis of sex, marital status, race, color, religion, national origin, and age.[431]

The Department of Housing and Urban Development (HUD) issued regulations implementing some portions of the Housing and Community Development Act of 1974,[432] but these regulations were often ineffective for meeting congressional intent.[433] For example, although HUD issued regulations for the development of housing assistance plans by local jurisdictions,[434] the regulations did not require that the plans describe positive steps the localities took to assure that the plans were carried out effectively. Localities were not required to make a commitment to accept housing subsidy programs within their jurisdiction,[435] or to take initiative on their own to build housing for low- and moderate-income families. Unless HUD revises its regulations to require that the plans contain action items for increasing the options of minority homeseekers, the objectives of the 1974 Act will not be promoted.[436]

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[419] Hills v. Gautreaux, 425 U.S. 284 (1976).

[420] The Supreme Court concluded:

> In this case, it is entirely appropriate and consistent with [Milliken v. Bradley, 418 U.S. 717 (1974)] to order CHA [the Chicago Housing Authority] and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. . . .An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation". . . .To foreclose such relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken's* principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct. *Id* . at 1547.

[421] *Public Papers, supra* note 415.

[422] Pub. L. 93-383, Aug. 22, 1974, 88 Stat. 633, as codified in various sections of 5, 12, 20, 31, 40, 42, and 49 U.S.C.

[423] The 1974 act resulted from considerable deliberation by Congress, although some of the thinking behind the act was proposed by the Nixon administration. See 3 *U.S. Code & Admin. News* 4274 (1974). The Congress also passed the Emergency Homeowners Relief Act of 1975 which provides emergency mortgage relief payments to homeowners to prevent mortgage foreclosure. 12 U.S.C. §2701 *et seq* . (Supp. V, 1975).

[424] 42 U.S.C. §1437(c) (Supp. V, 1975). This program is commonly referred to as "Section 8."

[425] 42 U.S.C. §5304(a)(4) (Supp. V, 1975). To receive community development funding, a locality must address its needs for low-income housing, not only for the current residents of the locality, but also for those who might be expected to reside there. The term "expected to reside" is defined in HUD regulations, 41 *Fed. Reg.* 11128 (Mar. 16, 1976), discussed in note 435 *infra* .

[426] 42 U.S.C. §3604 (Supp. V, 1975).

[427] 12 U.S.C. §1735(f)(5) (Supp. V, 1975).

[428] 12 U.S.C. §§2801-2809 (Supp. V, 1975).

[429] 12 U.S.C. §2803 (Supp. V 1975). The data required under this act are essential for examining the compliance status of federally regulated mortgage lending institutions. In the absence of such data it has been almost impossible for the Federal financial regulatory agencies to determine the extent to which mortgage lenders have discriminatorily denied loans to minorities and women. This problem is discussed in *To Provide. . .For Fair Housing* , *supra* note 412, at 183-90. The Federal Reserve Board issued regulations regarding the Home Mortgage Disclosure Act on June 14, 1976. See 41 *Fed. Reg.* 23931 (June 14, 1976).

[430] Redlining has long been practiced by mortgage lenders. A 1975 Commission report pointed out that:

> The policies of the four Federal financial regulatory agencies charged with the responsibility for the supervision and regulation of mortgage lenders also endorsed overt racial and ethnic discrimination in mortgage lending until passage of the 1968 Fair Housing Law. Mortgage lenders were left free to consider minorities as less desirable risks than whites, regardless of minority applicant's personal or financial worth. They routinely refused to provide minorities mortgages for homes in nonminority areas. These practices were stoutly defended as essential elements of prudent banking by lenders and regulatory agency personnel alike. *Twenty Years After Brown* , *supra* note 402.

[431] 15 U.S.C. §1691 (Supp. V, 1975), as amended by Pub. L. 94-239 (1976). See also the discussion in pt. A, sec. V(D) *infra* .

[432] See 24 C.F.R. §570 (1975). With regard to the Section 8 program, see text accompanying note 424 *supra* ; see also 41 *Fed. Reg.* 19830 (May 13, 1976); 41 *Fed. Reg.* 17488 (Apr. 26, 1976), 41 *Fed. Reg.* 17468 (Apr. 26, 1976); 41 *Fed. Reg.* 15845 (Apr. 15, 1976); 41 *Fed. Reg.* 14662 (Apr. 6, 1976).

[433] See, e.g., testimony of Robert C. Weaver, president, National Committee Against Discrimination in Housing, before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, Mar. 9, 1976 [hereinafter referred to as Weaver testimony]. According to Mr. Weaver, as of March 1967, HUD regulations were weak with regard to voluntary

Furthermore, as of July 1976, almost 2 years after the 1974 act had been passed, HUD regulations were not sufficiently specific for implementing that act's prohibitions of sex discrimination. For example,[437] HUD's Title VIII regulations pertaining to race, religion, and national origin were revised to acknowledge the amendment to Title VIII,[438] essentially by the simple addition of the term "sex" where the other prohibited bases of discrimination were mentioned.[439] However, these minor additions to the regulations were inadequate instruction to the real estate industry as to what is necessary to eliminate sex discrimination. For one reason, discrimination on the basis of sex, prohibited by Title VIII, is of a somewhat different character than that based on race and ethnic origin,[440] and past experience with racial or ethnic discrimination is not always relevant as a guide in the area of sex discrimination. For another, since sex discrimination is so widely accepted by mortgage lenders as a sound business practice,[441] it is doubtful that without further direction from HUD, mortgage lenders would have known what their responsibilities were or how to have carried them out.

HUD's inadequate regulations gave the appearance of condoning the very discriminatory practices which the 1974 act was intended to eliminate,[442] but the White House did not encourage HUD to improve either its regulations pertaining to the community development block grant program or its regulations on sex discrimination.[443] Such encouragement would have seemed entirely appropriate, however, and the fact that it did not come forth indicates that there was a lack of Executive leadership for enforcement of the Nation's fair housing law. The White House staff have, in the past, assisted Federal agencies to develop regulations.[444] Further, the Domestic Council's Associate Director for Housing and Community Affairs, responsible for ensuring that Federal agencies are following this Nation's fair housing policy,[445] would have been a logical candidate for providing such assistance to HUD.

In 1976, however, it appeared that the Domestic Council staff had done little with regard to problems of housing for minorities or women. There had been

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affirmative marketing agreements and promoting spatial deconcentration of housing opportunities for low-income persons.

[434] 24 C.F.R. §570.303(c) (1975). The assistance plans required four steps: an accurate survey of the condition of community housing stock, estimates of lower-income housing assistance needs based on the needs of low-income families residing or expected to reside in a community; an annual goal for the number of persons to be assisted, and indications on census tracts of the location of proposed new low-income housing.

[435] The phrase "expected to reside" was used in the sense of providing "estimates of the number of lower-income families with workers expected to be employed in the community in the next 3 years as a result of known commercial, industrial, governmental, or service employment to be generated by a new or expanded development." 24 C.F.R. §570.303(c)(2)(i) (1976). This estimate must further "include estimates of the number of lower-income families with workers already employed in the community, but living elsewhere, who could reasonably be expected to reside in the community if housing they could afford were available." *Id.*

[436] A major objective of the 1974 act is:

> . . . the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income. . . . 42 U.S.C. §5301 (Supp. V, 1975).

[437] By way of another example, as of July 1976, HUD had issued no regulations for implementation of the 1974 act's prohibition against sex discrimination in federally related mortgage loans. 12 U.S.C. §1735f-5 (Supp. V, 1975). Similarly, HUD had failed to clarify through regulations the statutory requirement that the combined incomes of a husband and wife be used for determining mortgage credit. 12 U.S.C. §1735f-5 (Supp. V, 1975). Clagett interview, *supra* note 411. HUD had distributed a handbook to its field staff which stated that the combined incomes of a husband and wife should be used for determining mortgage credit. These instructions, however, did not have the legal status of formal regulations. Telephone interview with Steven Tursky, program analyst, Office of Fair Housing and Equal Opportunity, HUD, July 7, 1976.

[438] 42 U.S.C. §3601 *et seq.* (1970).

[439] 40 *Fed. Reg.* 20079-80 (1975). These regulations pertained to data collection, public conferences on fair housing, fair housing posters, and requirements for State fair housing laws and agencies in States which process Title VIII complaints.

[440] For example, in the area of mortgage finance, women have been faced with mortgage lenders who inquire into their childbearing intentions before making loans or refuse to count all or some of their salaried income in evaluating their creditworthiness. Some mortgage lenders have refused outright to lend money to women in their own names. In contrast, when doing business with minorities, mortgage lenders engaged in such practices as refusing to make loans in minority or integrated neighborhoods or issuing loans to minorities only for certain neighborhoods. See U.S. Commission on Civil Rights, *Mortgage Money: Who Gets It?* (1974).

[441] *Id.* at 18.

[442] See Weaver testimony, *supra* note 433.

[443] May interview, *supra* note 88.

[444] For example, when the Departments of Health, Education, and Welfare and Labor considered regulatory changes pertaining to affirmative action in higher education, White House staff reviewed the issues involved. Indeed, the President met with representatives of institutions of higher education to seek their views on the matter. White House attention to affirmative action in higher education is discussed in sec. VI(B) *supra*.

[445] According to the Associate Director, one of the roles of the Domestic Council was to coordinate policy and to make sure that agencies are following Presidential directions. May interview, *supra* note 88.

turnover in the position of associate director with responsibility for housing. When the position was filled in early 1976,[446] the Domestic Council did not take the opportunity to hire an expert in Federal fair housing efforts. Moreover, there was no system for passing on the knowledge accumulated by staff while working on a project to their successors in that project.[447] Thus, work of the civil rights staff on housing projects sometimes failed to culminate in measurable accomplishments. For example, White House staff repeatedly learned about the importance of considering the need for low-income housing in making decisions concerning the disposal of Federal surplus property, but never took action to establish low-income housing as a priority for its use.[448]

At least part of the White House failure to consider key housing issues appears to have been due to its reactive approach to civil rights issues. Staff involvement with a topic seems more likely to have been determined by complaints that the status quo was being disturbed than by a systematic evaluation of policy implementation. To illustrate,[449] one of the areas falling within the domain of the Associate Director for Housing and Community Affairs was the selection of locations for Federal facilities. The Associate Director indicated that because of citizen concern over the possible location of a juvenile center[450] in San Diego, California, the Domestic Council became involved in the issue.

This contrasts with the selection of a site for the Mint in Denver, Colorado. One major site under consideration was clearly to the disadvantage of Denver's minorities.[451] In this case, there was no likely threat to the status quo, and the Domestic Council did not become involved. There was potentially a serious departure from Federal fair housing policy,[452] however, and White House interest in the matter could not only have accelerated an equitable solution to the problem, but would also have demonstrated a concern for the implementation of that policy.

E. Business Enterprise

During the Ford administration, Federal assistance to minority-owned businesses generally declined.[453] Unlike the previous administration which focused considerable attention on minority economic development,[454] the Ford administraton placed little emphasis on the development, growth, and expansion of minority enterprise. In late 1974, the Ford administration issued a directive indicating a commitment to minority-owned businesses, but this commitment was not sufficiently forceful,[455] nor did it result in increased support of minority enterprises.

President Ford stated that he requested an increase of 100 percent in funding for the Small Business

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[446] Earlier in the Ford administration a similar position, that of Associate Director for Housing and Community Development, was held by Todd R. Hullin, who left the Domestic Council staff on Jan. 31, 1976.

[447] F. Lynn May who assumed fair housing responsibilities in February 1976 stated that he was only in the process of getting to know the people involved. May interview, *supra* note 88.

[448] The Federal Government disposes of thousands of acres of surplus property each year, often with housing units on them. Transfer of such property for use as low-income housing could be an effective and efficient means for filling the Nation's critical shortage of low-income housing. For example, the Center for National Policy Review has identified a number of former air force bases with low-income housing potential. Letter from Kathleen Mullen, Center for National Policy Review, Catholic University, to Cruz Reynoso, University of New Mexico School of Law, Oct. 24, 1974; and letter from Alexander P. Humphrey, attorney, Pine Tree Legal Assistance, Bangor, Me., to Glenda Sloane, supervising attorney, Center for National Policy Review, Catholic University, Sept. 20, 1974.
The need to establish low-income housing as a priority use of Federal surplus property was repeatedly called to the attention of the Federal Property Council, which promised to consider the possibility. Apparently no action was taken by the Council even to review the matter. F. Lynn May, who in March 1976 was about to inherit responsibilities for staff work on the Federal Property Council, was unfamiliar with these issues. May interview, *supra* note 88. As discussed in pt. A, sec. V(D) *supra*, in 1973 Commission staff provided extensive material on this subject to Anne L. Armstrong, Counsellor to President Nixon and Chairperson for the Federal Property Council.

[449] For other examples see secs. VI(B) and (C) *supra*.

[450] May interview, *supra* note 88. In this case a controversy developed in late 1975 around the location of a Federal juvenile correctional center planned by the Bureau of Prisons, Department of Justice. The Bureau selected a location site surrounded by a middle-class San Diego neighborhood. Residents of the neighborhood protested to the mayor of the city concerning the site selection. The mayor then contacted the White House in opposition to the center's creation. Subsequently, the Bureau of Prisons changed its decision regarding the location, primarily because of the well organized, middle-class opposition to the center. Telephone interview with John Billings, assistant to the chief probation officer, San Diego, Calif. County Probation Department, June 23, 1976.

[451] Major alternative locations for the mint included Park Hill, an integrated city community, and Littleton, a white suburb of Denver. After much controversy in 1975 and 1976, the Park Hill location was tentatively selected, although as of June 1976 no final decision was reached and the General Accounting Office was instructed by the Senate Committee on Banking, Housing, and Urban Affairs to study whether the mint should be built and where. Since a large percentage of the mint's past employees had been minorities, and since the suburban location lacked low-income housing, such a location would have resulted in negative impacts on minority employees. The controversy is discussed in testimony of Bill Roberts, Denver City Councilman, to the Senate Banking, Housing and Urban Affairs Comm., Feb. 27, 1976. See also Leonard Larson, "Effect on Core City, Suburbs Unresolved in Mint Debate," *Denver Post*, Feb. 29, 1976, at I.

[452] Federal site selection policy is discussed in *To Provide . . . For Fair Housing*, *supra* note 412, at ch. 4.

[453] See Burke remarks, *supra* note 31 for a discussion of this decline.

[454] Minority business enterprise under the Nixon administration is discussed in pt. A, sec. V(E), *supra*.

[455] The President's directive to Government agency heads instructed them to involve minority business "in government programs as contractors, subcontractors, bankers, etc., and that management, technical and financial assistance be provided *whenever feasible*." [Emphasis added.] Memorandum from the President to Department Heads, Dec. 11, 1974.

Administration's minority loan and loan guaranty program from fiscal years 1975 to 1977,[456] However, data on actual outlays indicate that the Ford administration expenditures in this area were only modest. President Nixon set a goal of $1.20 billion for outlays to minority enterprise for fiscal year 1975.[457] In that year under President Ford, outlays for minority enterprise increased $57 million from fiscal year 1974,[458] reaching a total of $1.03 billion.[459] This total, however, was far short of the Nixon goal.

A highlight of the Nixon administration was a program to assist minority banks. According to *Black Enterprise* , the number of minority banks increased from 28 in 1970 to 43 in 1973 and deposits increased from $397 million to about $875 million in that time period.[460] In August 1976, the White House listed as one of President Ford's civil rights accomplishments that "the Administration is continuing a successful program begun in 1970 to increase the deposits held by the nation's 71 minority-owned banks."[461]

Although President Ford issued a memorandum to members of his Cabinet affirming his support for the Federal deposits program in minority banks,[462] the Ford administration did very little else to assist this area of minority enterprise. In 1973, nearly $89 million was deposited in minority banks. This figure, however, declined substantially in 1974 and 1975 when the deposits were $65 million, and $78 million, respectively.[463] Another indication of this administration's decreased emphasis on minority banks was that President Ford's budget for both fiscal years 1976 and 1977 did not include information on Federal deposits in minority-owned banks. Such an item was included in the budget under President Nixon.[464]

White House staff repeatedly stated that one reason for the lack of focus on minority business enterprise was the downturn in the economy, which resulted in less money for business in general.[465] This downturn in the economy was implicit in the Small Business Administration's (SBA) *Fiscal Year 1975 Report* as an explanation for its decline in loans to minorities during that year.[466]

There is good reason to believe that while the downturn in the economy was offered as an excuse for little action in the area of minority business, it was not a full explanation for the poor Federal effort. If the downturn in the economy were the only factor in operation, it would be expected that minority and nonminority businesses would suffer equally; yet, aid to minority business during the Ford administration suffered more than aid to businesses in general. To illustrate, minority business participation in SBA's 7a, or regular business loan program, declined at a greater rate from fiscal years 1974 to 1975 than did total participation during that time. SBA data showed that in fiscal year 1974 under SBA's 7a program,[467] $171.4 million in loans went to minorities of the total amount of $1.49 billion in loans issued.[468] In fiscal year 1975 only $137.2 million in loans went to minorities, of the total amount of $1.25 billion in loans.[469] Thus, from fiscal years 1974 to 1975, the amount of loans to minorities declined 20 percent, while the amount of loans to nonminorities declined only 14 percent.[470]

SBA's data on female businesses showed that there was also a dramatic decrease in minority female participation in SBA's programs, although total female participation has increased substantially in recent years. In fiscal year 1974 minority females received 602, or 30.7 percent, of the 1,947 loans made to women. In the first 11 months of fiscal year 1976, minority women received only 655, or 24.7 percent, of the 2,656 loans made to women.[471]

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[456] The White House, *The Ford Presidency : A Portrait of the First Two Years* 32 (August 1976).

[457] *United States Budget, Fiscal Year 1975, Special Analysis L, Federal Civil Rights Activities* at 172.

[458] *United States Budget, Fiscal Year 1976, Special Analysis M , Federal Civil Rights Activities* at 221. It should be noted that neither the budget of the United States Government nor the annual reports of the Small Business Administration provided data for specific minority groups such as blacks or persons of Spanish origin. Thus, for the most part, this analysis extends to minorities in general.

[459] *United States Budget, Fiscal Year 1977, Special Analysis M, Federal Civil Rights Activities* at 241.

[460] *Black Enterprise* , "The Government and Black Business Growth," (June 1973). As of October 1975 there were over 70 of these institutions with total deposits of $1.3 billion. See memorandum from the President to Department and agency heads, Oct. 22, 1975, and Scott interview, *supra* note 23.

[461] *The Ford Presidency* , *supra* note 456, at 32.

[462] Memorandum from the President, *supra* note 460.

[463] Letter from Richard L. Gregg, depository systems specialist, Department of Treasury, to Carlton Terry, equal opportunity specialist, U.S. Commission on Civil Rights, July 6, 1976.

[464] *1975 Special Analysis* at 186.

[465] Parsons interview, *supra* note 59. See also Scott interview, *supra* note 23.

[466] Small Business Administration, *Fiscal Year 1975 Report* at 32 and 33 [hereinafter referred to as *SBA Report*].

[467] Section 7a of the Small Business Act, 15 U.S.C. §636(a) (1970).

[468] In that year, of the 21,312 loans issued, 2,944 went to minorities. SBA *Report* , *supra* note 466.

[469] In that year, of the 18,184 loans issued, only 2,462 went to minorities. *Id.*

[470] Similarly, from fiscal years 1974 to 1975, there was a decline of 20 percent in the number of loans made to minorities, as compared with a decline of only 16 percent in the number of loans to nonminorities.

[471] The actual number of loans to black women decreased during this time period from 286 to 264. SBA, *The Facts About Women as Users of SBA Services* 9, 11 (June 1976)

Despite the disproportionate reduction in loans to minority businesses, SBA's report stated that "Funding levels to [the minority business sector] of the small business community fell off, but the rate of decline was less than that experienced by the nonminority sector of the small business community served by SBA."[472]

There was also a disproportionate decrease in minority participation as Government contractors. Outlays for contracts with minority firms totaled only $663 million during fiscal year 1974.[473] In fiscal year 1975, this figure decreased slightly to $660 million.[474] Total Federal purchases of goods and services, however, increased from $301.1 billion to $330.9 billion from 1974 to 1975.[475] Moreover, contracts are not "assistance" in any traditional sense, since the contractors are providing goods or services which the Government needs in exchange for the dollars they receive.[476] However, these contracts are a means by which both minority and nonminority businesses can grow. It is incumbent upon the Federal Government to seek increased minority participation in Government contracts because minorities have previously been excluded from them. Thus, a downturn in the economy should not have been a reason for decreasing contracts with minorities.

In fiscal year 1975, the Small Business Administration made 2,050 loans to women, approximately 9 percent of all loans made by the agency. These loans totaled $101,797,487 or 6.6 percent of the dollar amount of loans to SBA applicants.[477] In the first 6 months of fiscal year 1976, SBA approved 1,234 loans to women which accounted for 10.4 percent of the total loans made. These loans represented 7.5 percent of the total dollar amount of loans to SBA applicants, approximately $69.7 million.[478]

Despite some effort to increase female participation in loans programs, the administration placed little emphasis on aid to female-owned businesses.[479] Female-owned businesses, like those owned by minorities, encountered problems of staggering proportions. Many women found it difficult to obtain information on Federal, State, and local government contracting opportunities in time to submit bids. They also were unable to find working capital necessary for effective marketing and bidding.[480]

In fiscal year 1974, the National Commission on Observance of International Women's Year asked the President to amend Executive Order 11625[481] so that women would be covered by that order.[482] Executive Order 11625 defines the authorities and responsibilities of various Federal agencies involved in the Federal minority enterprise program.[483] In July 1976 a proposed revision of that Executive order was circulated to Federal agencies for comment.[484] The proposed revision, however, did not expand the order to include female business enterprise. Thus, the Ford Administration did not take what could have been the most important step in assisting female businesses.

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[472] SBA *Report*, *supra* note 466, at 33.

[473] *1976 Special Analysis M*.

[474] *1977 Special Analysis M*.

[475] *Economic Report of the President*, transmitted to the Congress, Jan. 26, 1976, at 171. The figure for 1975 was a projection based on actual figures for the first three quarters of fiscal year 1975 and a projected figure for the fourth quarter.

[476] This issue is discussed further in pt. A, sec. V(E), *supra*.

[477] Statement of Louis F. Laun, Deputy Administrator, Small Business Administration, Before the Select Comm. on Small Business, United States Senate, Feb. 24, 1976, at 10 and 11.

[478] *Id*. Information which became available in July 1976 showed that for the first 11 months of fiscal year 1976, SBA made 2,050 loans to women, totaling more than $100 million. *The Facts About Women as Users of SBA Services*, *supra* note 471, at 10.

[479] The *1977 Special Analysis of Federal Civil Rights Activities* provided data on business assistance to minorities, but not to women. *1977 Special Analysis*, at 241. The special Budget document *Seventy Issues*, which provided detailed data for the layperson on some of the President's proposals which OMB found to be of general interest, contained a section on minority enterprise, but no section on female enterprise. Office of Management and Budget, *Seventy Issues, Fiscal Year 1977 Budget*.

[480] See U.S. Commission on Civil Rights, *Minorities and Women as Government Contractors* (May 1975). See also the U.S. Interdepartmental Task Force for International Women's Year, "Report and Recommendations" (1975). The Special Assistant for Women stated that increased emphasis had been placed on female-owned businesses. As a result of a meeting held in the White House (see note 201 *supra*) seminars had been held across the country by the Small Business Administration and other Federal agencies. The first seminar was held in Kansas City, Mo., July 15, 1976, and was attended by 1,500 women from four States. Nationally recognized business leaders discussed techniques for starting and managing small businesses. In addition, the Office of Federal Contract Compliance Programs, Department of Labor, sponsored an information exchange seminar in September 1976. The purpose of the seminar was to provide information to women entrepreneurs regarding Federal Government procurement and contracting processes and to encourage increased communications between Federal procurement agents, major corporations, and women entrepreneurs. Holm and Keesling interview, *supra* note 19.

[481] Exec. Order No. 11625 3 C.F.R. 213 §2.3 (1971 Comp.).

[482] *To Form a More Perfect Union*, *supra* note 156, at 64.

[483] One significant deficiency in Federal programs to assist business enterprise was that the Small Business Administration regulations, in listing those groups eligible for assistance under Section 8a of the Small Business Act, did not include women. (See 13 C.F.R. §124.8-1(c) (1975)). The act contains no such restriction. 15 U.S.C. §637(a)(1970). This problem is discussed in *Minorities and Women as Government Contractors*, *supra* note 480, at 51.

[484] See, for example, letter from William M. Nichols, General Counsel, Office of Management and Budget, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 15, 1976, and attachment to that letter "Prescribing additional arrangements for the improvement of a Native Program for Minority Business Enterprise."

Chapter 2

OFFICE OF MANAGEMENT AND BUDGET (OMB)

I. PROGRAM AND CIVIL RIGHTS RESPONSIBILITIES

A. Program Responsibilities

The Office of Management and Budget is responsible for oversight and review of the entire operation of the executive branch. Its functions affect all Federal departments and agencies.

Its single most important duty is to supervise the preparation and implementation of the Federal budget.[1] It approves funding and personnel levels for all executive agencies. It determines whether, from a cost-benefit point of view, congressional appropriations are expended for the purposes authorized and in the most economical manner with as little duplication of effort as possible.

There has been a Federal budget agency for over 50 years. The Bureau of the Budget (BOB),[2] OMB's predecessor organization, was one of the most important institutions in the Federal bureaucracy,[3] assisting the President in making decisions as to how money would be spent for Federal programs. Throughout the years, the authority of the budget process has continued to grow.

The Office of Management and Budget, created from BOB on July 1, 1970,[4] appears to have become even more powerful than its predecessor.[5] Although it inherited BOB's responsibilities for preparing and overseeing the execution of the budget, OMB was created to place far greater emphasis on management. President Nixon, in seeking congressional clearance of OMB's establishment,[6] emphasized that the change included more than "a mere change of name for the Bureau of the Budget. It represents a basic change in concept and emphasis reflecting the broader management needs of the Office of the President."[7] The budget function, he indicated, would be only one of several important tools available to OMB. Others would include program evaluation and coordination, improvement of executive branch organization, the use of information and management systems, and development of executive talent. OMB would be directed to: ". . .place much greater emphasis on the evaluation of program performance: on assessing the extent to which programs are actually achieving their intended results, and delivering the intended services to the intended recipients."[8]

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[1] OMB is assigned budget responsibility pursuant to the Budget and Accounting Act of 1921. 31 U.S.C. §16 (1970). OMB's budget responsibilities are discussed in sec. III, *infra*.

[2] The Bureau of the Budget (BOB) was created in the Department of the Treasury by the Budget and Accounting Act of 1921, ch. 18, §207, 42 Stat. 20. It was transferred to the Executive Office of the President July 1, 1939, by the Reorganization Act of 1939, ch. 36, §4, 53 Stat. 561. Until 1974 the President could, after investigation, transmit to Congress a plan for consolidating, transferring, or abolishing an organizational unit if the purpose was to promote efficiency or accomplish other objectives outlined in the statute. The President was required to submit with a reorganization plan a message to Congress explaining the proposed changes; a plan automatically took effect 60 days after its submission unless either House of Congress objected between the date of the transmittal and the end of the 60-day period. 5 U.S.C. §906 (1970). This authority expired in 1974 and was not renewed by the Ford administration.

[3] See C. Rossiter, *The American Presidency* 98, 99 (1956); and P. Brundage, *The Bureau of the Budget* (1970). See also U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* 326 (1971) [hereinafter referred to as the *1971 Enforcement Effort* report].

[4] Reorganization Plan No. 2 of 1970 transferred to the President all functions of the Bureau of the Budget. By Exec. Order No. 11541 these functions were delegated to the Director of the Office of Management and Budget. Reorganization Plan No. 2 of 1970, 84 Stat. 2085, effective July 1, 1970; Message of the President Accompanying Reorganization Plan No. 2, Feb. 9, 1970 [hereinafter referred to as President's Message]; and Exec. Order No. 11541, 3 C.F.R. 1966–1970 Comp., p. 939. See notes to 31 U.S.C. §16 (1970).

[5] An article in *Science* said of the Federal budget function: ". . .its influence has increased steadily as the government has grown in size and complexity, particularly in the last decade with the proliferation of social and welfare programs." "Office of Management and Budget: The View From the Executive Office," 183 *Science* 180 (1974). This was the first in a series of three articles in *Science* discussing the power and authority of OMB. See "Office of Management and Budget: New Accent on the M in OMB" 183 *Science* 286 (1974); and "Office of Management and Budget: Skeptical View of Scientific Advice," 183 *Science* 392 (1974). See also J. Herbers, "The Other Presidency," *New York Times Magazine* 16 (Mar. 3, 1974); S. Stafford, "Political OMB Cuts Agencies to Size," 7 *Government Executive* No. 8 (Aug. 1974), at 20; and J. Havemann, "Executive Report/OMB's New Faces Retain Power, Structure Under Ford," 6 *National Journal Reports* 1071 (July 26, 1975).

[6] Since OMB was established pursuant to a reorganization plan, congressional clearance was required. See note 2 *supra*.

[7] President's Message, *supra* note 4.

The role intended by President Nixon for OMB appeared to be "a kind of supermanager that would give the President formalized control of his Administration without his having to work the levers of power on a daily basis."[9] Roy L. Ash, one of the initial proponents[10] and a former Director of OMB seemingly [illegible] concur in this view. He has stated that:

> [I]f the Government were very small, or if the President miraculously would not have 24 hours a day but would have 2,400 hours a day, then he would be doing the same thing that OMB is doing. It is an extension of his office, operating under this authority, doing those things that he would do if we were a smaller Government or he had some special number of hours available to him each day.[11]

Additionally, OMB has a number of other important functions. OMB is responsible, "when directed by the President,"[12] for making detailed studies on what changes should be made in the "Government's existing organization, activities, and methods of business. . . ."[13] as well as on agency program assignments and appropriations. Federal law[14] also requires OMB to prescribe and administer regulations directing agencies[15] to conduct systematic evaluations of the efficiency of their operations.

OMB also exercises comprehensive power over all proposed Federal legislation.[16] The annual legislative submissions of Federal agencies must include all items of legislation which an agency contemplates proposing to Congress during the coming session, any pending items of legislation which an agency intends actively to support, and expiring laws which an agency proposes to be repealed.[17] OMB must also provide advice to Federal agencies concerning their reports[18] on bills pending in Congress. Moreover, OMB reviews enrolled bills[19] and recommends to the President either that they be signed or vetoed.[20]

OMB exercises two important functions with respect to the collection of data by the Federal Government.[21] OMB is required to review every data collection form proposed by most Federal agencies for circulation to 10 or more people;[22] no agency may proceed to collect information through such a form until the Director of OMB has cleared the proposed collection of information. In addition, the Congress has directed the President, through the Director of OMB: "to develop programs and to issue regulations and orders for the improved gathering, compiling, analyzing, publishing, and disseminating of statistical information for any purpose by the various agencies in the executive branch of the government."[23] OMB, thus, has overall supervisory responsibility for the Government's statistical activities.

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[8] *Id.*

[9] Herbers, *supra* note 5, at 16. In 1974, OMB appeared to accept this interpretation as an accurate statement of its functions since the Herbers article was provided by the OMB Information Office in response to inquiries about the nature and functions of OMB. Herbers also wrote:

> OMB can wield enormous power through relatively few people because in representing the President it decides to a large extent how much money will be spent for each program. It then oversees how each program is carried out. . . . OMB is equipped with the staff and computers to make the necessary analyses, and it has access to every study and piece of information gathered by the departments and agencies. In OMB one could learn virtually all there is to know about any branch of the Federal government, however remote from the center of power. For every program, every expenditure of any size, there is someone in OMB watching. *Id.*

[10] Roy L. Ash headed the President's Advisory Council on Executive Organization which made recommendations on which President Nixon based his plan to establish OMB. President's Message, *supra* note 4.

[11] Herbers, *supra* note 5, at 38. For an analysis of other possible implications of the reorganization of the Bureau of the Budget into OMB, see H. Heclo, "OMB and the Presidency—The Problem of 'Neutral Competence,'" *Public Interest* 80–98 (Winter 1975).

[12] 31 U.S.C. §18 (1970). Congress, in the Budget and Accounting Procedures Act of 1950, provided that:

> The President, through the Director of the Bureau of the Budget, is authorized and directed to evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government with a view to efficient and economical service. 31 U.S.C. §18a (1970).

[13] *Id.*

[14] 5 U.S.C. §305 (1970).

[15] Certain agencies and the Department of Defense are exempted from this statute.

[16] The function of coordinating the position of the executive branch on proposed legislation had also been vested with BOB. See President's Message, *supra* note 4. For a discussion of OMB's role in reviewing legislation see sec. VI *infra*.

[17] See OMB Circular No. A-19 (Revised) (July 31, 1972) and sec. VI *infra*. OMB communicates instructions to agencies and departments through circulars and bulletins. A circular is used to transmit information of a nature continuing in effect. The bulletin series serves to communicate information requiring single or one-time action by agencies. See OMB Circular No. A-1 (Revised) (Aug. 7, 1952).

[18] In the context of legislative review, OMB uses the term "report" to refer to any written expression of official views for transmittal to Congress or for presentation as testimony before a congressional committee.

[19] An enrolled bill is a bill or resolution passed by both Houses of Congress and presented to the President for action. If OMB provides advice to an agency which is contrary to the agency's view, the agency must review its position. If the agency declines to modify its position, it must incorporate OMB's advice in its report.

[20] In 1973, it was reported that every 2 years, OMB receives about 1,000 agency draft legislative proposals. Committees of Congress ask OMB for the administration's view on over 2,500 bills introduced in each Congress, and 10,000 agency reports on legislation are processed through OMB to the Congress. "White House Report/OMB's legislative role is growing more powerful and more political," . *National Journal Reports* 1589, 1596, (Oct. 27, 1973).

[21] For a discussion of the significance of data collection to civil rights, see sec. V *infra*. OMB inherited its functions regarding data collection from its predecessor, BOB.

[22] OMB Circular No. A-40 (Revised), May 3, 1973. OMB's review of forms is conducted pursuant to a provision of the Federal Reports Act of 1942, as restated and codified at 44 U.S.C. §3509 (1970). Even for forms proposed for submission to fewer than 10 persons, the Director of OMB has the power to determine whether proposed agency information-gathering will serve any proper purpose; if the decision is that the information-gathering is unnecessary, the agency may not engage in such collection. 44 U.S.C. §3506 (1970). In actuality, it has not been the practice of the Director to intrude into data collections addressed to fewer than 10 respondents. Moreover, in certain circumstances, as in the investigation of a specific complaint by a law enforcement agency such as OCR and OFCCP, he determined that data collections associated with such an investigation were not subject to the Federal Reports Act. Letter from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Dec. 21, 1976.
Independent Federal regulatory agencies, including the financial regulatory agencies and the Equal Employment Opportunity Commission, are exempt from this requirement. Responsibility for clearing forms devised by the

Other responsibilities of OMB include providing technical services to State and local governments and supervising interagency cooperation in the field through assistance to the Federal Regional Councils and Federal Executive Boards;[24] aiding in the consideration and clearance of proposed Executive orders and Presidential proclamations; and planning programs for the recruitment, training, and retention of career executive employees of the Federal Government.

B. Civil Rights Responsibilities

OMB's program responsibilities provide it with a significant opportunity to have a vital impact on the performance of the executive branch in carrying out the constitutional mandate to uphold the Nation's civil rights laws. Through the budget review process, OMB has a direct influence on the level of resources allocated to civil rights programs and enforcement. As the President's chief aid in program evaluation, OMB is authorized to assess whether Federal programs are actually reaching intended beneficiaries regardless of their race, ethnicity, or sex as well as whether civil rights laws are being efficiently executed.[25] Through its review of agency proposals for data collection and its overall supervision of the Government's statistical activities, OMB can ensure a system for collecting data showing whether minorities and women are receiving their fair share of the benefits provided by the Government. In reviewing and clearing all legislative proposals, OMB can also ensure adequate consideration of civil rights implications.

At the time OMB was being established, this Commission noted this vast potential:

> An enlarged program evaluation effort, accompanied by a sensitivity to the unique problems of minority groups in America, could produce dramatic changes in agency policies in a reasonably short period of time. It remains for the Director and staff of the proposed Office of Management and Budget to make civil rights problems a priority issue of concern and to shape the mechanisms necessary to uncover the problems neglected for so many years by its predecessor [BOB] and the other Federal agencies.[26]

The first Director of OMB, George P. Shultz,[27] responded quickly to the need for an OMB focus on civil rights. In October 1970 Director Shultz instructed OMB staff to use the budget hearing process[28] to convey the administration's concern for the "effective enforcement of existing civil rights policies and requirements."[29] In March 1971 in a second memorandum, Director Shultz laid the groundwork for OMB's civil rights program.[30] Recognizing the "considerable danger that the civil rights thrust [would] recede under the press of other considerations," Mr. Shultz concluded that OMB should build into its "institutional processes an ongoing concern with civil rights so that this concern [would become] a part and parcel of the regular activity of the agency."[31] He directed "all OMB examiners and management staff" to be "conscious of their civil rights responsibilities" and to "carry out such responsibilities in the course of their regular assignments."[32] To ensure that "all major functional areas within OMB" would have a role in civil rights efforts, he assigned to specific OMB units the following activities:

Federal regulatory agencies is held by the Comptroller General of the United States, 44 U.S.C. §3512 (1970) (Supp. V, 1975).

[23] 31 U.S.C. §18b (1970).

[24] For discussion of OMB's role with respect to the Federal Regional Councils and Federal Executive Boards, see chs. 3, and 4 *infra*.

[25] For further discussion of this point, see sec. IV *infra*.

[26] *1971 Enforcement Effort* report, *supra* note 3, at 330-31.

[27] George P. Shultz was Director of OMB from July 1, 1970, until June 12, 1972. He was succeeded by Caspar W. Weinberger, who directed OMB from June 12, 1972, until Feb. 1, 1973. Roy L. Ash served as Director from Feb. 2, 1973, until December 1974. James T. Lynn assumed the post on Feb. 5, 1975. The civil rights directives and activities of OMB during 1971 were evaluated in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort: One Year Later* 193-209 (1971) [hereinafter referred to as *One Year Later* report]. Subsequent directives and activities were reviewed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—A Reassessment* 6-12 (1973) [hereinafter referred to as *Reassessment* report].

[28] The budget hearing process is discussed in sec. III(B) *infra*.

[29] Memorandum from George P. Shultz, Director, Office of Management and Budget, to OMB Assistant Directors and Division Chiefs, "Civil Rights Issues in the Budget Hearing," Oct. 30, 1970.

[30] OMB Office Memorandum No. 71-53 from George P. Shultz, Director, Office of Management and Budget, to OMB Staff, "OMB Civil Rights Activities," Mar. 25, 1971.

[31] *Id.*

[32] *Id.*

(1) OMB Circular No. A-11,[33] which provides instructions and forms to the agencies and departments for use in the budget submission process, was to be revised to collect information on expenditures for civil rights programs.

(2) A *Special Analysis on Civil Rights Activities* [34] was to be developed which would summarize the Government-wide civil rights program.

(3) The *Budget Examiners' Handbook* was to be revised to provide guidance on examining civil rights programs.[35]

(4) Information sessions on civil rights were to be instituted for OMB staff.[36]

(5) Civil rights problems were to be given consideration in OMB's issue process.[37]

(6) Civil rights concerns were also to be included in the coordination by OMB staff representatives of the activities of the Federal Regional Councils (FRCs),and the Federal Executive Boards (FEBs).[38]

(7) OMB Circular No. A-19, which governs OMB's legislative review and clearance function, was to be revised to require consideration of impact on civil rights.[39]

(8) The flow of information between other agencies with civil rights responsibilities and OMB was to be improved, and civil rights-related information was to be passed on to OMB staff "in a systematic, timely fashion in order to assist examiners and others in their evaluation efforts."[40]

(9) A review was to be conducted of civil rights statistical data collection, followed by the development of a program to improve the usefulness of such data for evaluating the performance of civil rights programs.[41]

(10) The achievement of civil rights goals was to be specifically included in the Performance Management System (PMS)[42] among the performance responsibilities of program managers.

(11) Finally, there was to be a selective review of agency activities involving "civil rights problems of interest to the Executive Office of the President."[43] OMB was to ensure that civil rights:

> are given explicit attention at an early stage in program planning and that agency civil rights policies and programs are consistent with overall policy and with the policies of other agencies in terms of impact at the field level.[44]

Subsequent directives on civil rights policy have reaffirmed the basic principles of the March 1971 directive by reminding OMB staff of the importance of OMB's civil rights role and providing specific instruction on the execution of that role. In October 1971, Director Shultz provided OMB staff with instructions on how to conduct a review of the enforcement of several civil rights laws and policies,[45] including Title VI of the Civil Rights Act of

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[33] This circular is revised annually. As of February 1976 the latest edition was an attachment to OMB Transmittal Memorandum No. 44 to the Heads of Executive Departments and Establishments, June 16, 1975. Circular A-11 is discussed further in sec. III *infra*.

[34] A *Special Analysis* is a review of a subject in terms of its funding, goals, policies, and accomplishments. It is part of the basic budget document. Director Shultz stated that the *Special Analysis* would "give those interested in this area a much fuller appreciation of the President's programs for civil rights. . . ." OMB Office Memorandum No. 71-53, *supra* note 30.

[35] The *Handbook* , which provides basic directives to budget examiners, is described briefly in sec. III *infra*.

[36] OMB staff had gained knowledge of civil rights only as instances arose in the course of agency review activities, rather than through any systematic exposure to the area of civil rights. OMB Office Memorandum No. 71-53, *supra* note 30.

[37] The issue process grows out of the annual budget submission. Unresolved issues are isolated and identified by staff most directly in contact with agencies. Should examiners feel review at a higher level within OMB is merited, papers are prepared and passed up the line. Director Shultz requested that elements be included in the criteria for selecting policy issues for review which would ensure that civil rights issues received at least the same degree of attention as was provided to other issues. Specifically mentioned by the Director were civil rights aspects of the impact of Federal programs, agency internal equal employment opportunity, and procurement set-aside contracts to minorities.

[38] FRCs, which are associations of Federal agency regional officials, are discussed in ch. 3 *infra*. FEBs, which are associations of Federal agency officials in 25 major cities, are discussed in ch. 4 *infra*.

[39] OMB Circular No. A-19 (Revised), *supra* note 17, is discussed in sec. VI, *infra* . This circular did not, in 1971, require a review of legislation for civil rights implications and issues, although it did require a review of the anticipated environmental impact and an analysis of the anticipated cost of the proposed legislation.

[40] OMB Office Memorandum No. 71-53, *supra* note 30.

[41] *Id*. This review is discussed in sec. V *infra* .

[42] PMS, a system of setting goals for program performance and measuring progress toward achievement, is discussed in *One Year Later* report, *supra* note 27, at 204 and *Reassessment* report, *supra* note 27, at 26. The Performance Management System (PMS) was never instituted in more than a few agencies, and has since, in terms of OMB's relationship with it, dropped from view. In response to a Commission inquiry as to which programs with civil rights implications were being evaluated through PMS, OMB replied that the Commission "should consult those agencies in whose civil rights programs they are interested to determine which agencies are using a Performance Management System." Response to U.S. Commission on Civil Rights questionnaire of April 1973, contained in a letter from Frederic Malek, Acting Director, Office of Management and Budget, to Stephen Horn, Acting Chairman, U.S. Commission on Civil Rights, July 2, 1973 [hereinafter referred to as OMB response]. OMB also indicated that instead of extending PMS in fiscal year 1974 to additional programs with civil rights implications, OMB would be instituting the new management by objective (MBO) process. *Id*. MBO is discussed in sec. IV *infra* .

[43] OMB Office Memorandum No. 71-53, *supra* note 30.

[44] *Id*.

[45] For example, in the area of Title VI, examiners were informed that they might wish to direct their attention to such areas as the number, race, and ethnic origin of potential and actual beneficiaries in federally assisted programs, the size of the Title VI staff in the Federal agency sponsoring the federally assisted programs, the methods of investigation used by the agency in Title VI reviews, and the actions taken by the agency when noncompliance was uncovered. OMB Office Memorandum No. 72-17, from Director Shultz to OMB staff, "Civil Rights," with attachment, "Civil Rights Considerations," Oct. [illegible]9, 1971.

1964[46] and Executive Orders 11246,[47] 11478,[48] and 11512.[49] In February 1972, Director Shultz announced that the Associate Director of OMB would monitor and coordinate the overall OMB civil rights efforts.[50]

In July 1973, Director Roy L. Ash reiterated the general civil rights responsibilities of all OMB staff, including the Deputy Director, while slightly revising the specific civil rights assignments previously made by Director Shultz.[51] Director Ash also significantly elaborated the previous instructions. He made clear that OMB's civil rights effort was to include both minority and women's rights.[52] Additionally, not only were there to be information sessions on civil rights for OMB staff, but all employees were to be held responsible for being familiar with OMB's "civil rights posture." Supervisors, as part of their total responsibilities, were to monitor staff on its civil rights performance.[53] Responsibility for civil rights statistics and data collection was elevated from the divisional level to that of an Assistant Director.[54]

In May 1975, Director James T. Lynn generally reaffirmed the civil rights responsibilities of OMB staff and the coordinating function of the Deputy Director.[55] The following October, after an appearance before the Interdepartmental Task Force of the National Commission on the Observance of International Women's Year (1975),[56] Mr. Lynn issued a significant directive to budget examiners on "the Impacts of Federal Programs on Women."[57] This directive required budget examiners to "take a critical look at" the involvement of women in programs under scrutiny during the fall budget review process and to call to the attention of the Director any programs having "negative impacts on women."[58] Further, Mr. Lynn stated, "It is important that OMB provide this kind of critical review not only in this International Women's Year, but also as an integral part of all our ongoing activities."[59]

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[46] 42 U.S.C. §2000d (1970).

[47] Exec. Order No. 11246, 3. C.F.R. 1964–19[illegible] Comp., p. 339.

[48] Exec. Order No. 11478, 3. C.F.R. 133 (19[illegible]).

[49] Exec. Order No. 11512.

[50] OMB Office Memorandum No. 72–37 from Director Shultz to OMB Staff, "OMB Civil Rights Activities." Feb. 12, 1972. The Associate Director was then Frank Carlucci. In October 1972, Director Caspar W. Weinberger issued revised instructions to OMB staff for conducting a civil rights review. OMB Office Memorandum No. 73–17, from Director Weinberger to OMB staff, "Civil Rights," with attachment, "Civil Rights Considerations," Oct. 19, 1972. The revisions, from Office Memorandum No. 72–17, in the list of considerations for civil rights review were slight. In the area of Title VI, for example, the only addition was that OMB staff was asked to consider how effectively the agencies' compliance programs were being administered and how they could be improved.

[51] OMB Office Memorandum No. 74–12, from Roy L. Ash, Director, to OMB staff, "Civil Rights Activities," July 26, 1973. The revised assignments were to: continue publication of the *Special Analysis on Federal Civil Rights Activities* , continue information sessions on civil rights for OMB staff, increase the flow of information between agencies with civil rights responsibilities and OMB staff, evaluate and improve civil rights statistics, conduct selective reviews of civil rights programs and policies, include civil rights concerns in field coordination activities with the Federal Regional Councils and Federal Executive Boards, and review proposed and pending legislation to determine civil rights effects in the legislative process and work out potential problems. In a few instances, assignments made by Director Shultz in OMB Memorandum No. 71–53 were not repeated by Director Ash. For example, no mention was made of Circular No. A–11 or the *Budget Examiners' Handbook* , perhaps because the revisions directed to be made in 1971 were thought to have been carried out. See *Reassessment* report, *supra* note 27, at 22 and *One Year Later* report, *supra* note 27, at 196. Concerning this footnote, OMB has stated:

> Specifically as regards data collection, the reference to the provisions in Office Memorandum No. 74–12 in [this footnote] is inaccurate. The cited office memorandum and its predecessor speak of meaningful civil rights data. The Commission appears to interpret this as involving the simple and universal identification of individuals by race, sex, and ethnic origin if they apply for or receive any Federal benefit. Oaxaca letter, *supra* note 22.

OMB thus appeared to be stating that this Commission's reference in this footnote to the provisions concerning data collection in OMB Office Memorandum 74–12 is both inaccurate and a misinterpretation of the memorandum. This Commission disagrees. The only reference to the provisions concerning data collection in Memorandum 74–12 is to a revised assignment to OMB staff to "evaluate and improve civil rights statistics." This is a direct and complete quotation of OMB's own summary of the assignment concerning data collection which was made to OMB staff in memorandum 74–12. The footnote contains no Commission interpretation regarding the assignment on civil rights statistics.

This Commission concurs with OMB that for civil rights data collection to be worthwhile it must be "meaningful." This Commission's view on data collection is discussed in sec. V *infra* .

[52] This was made clear by example. Data collection was to include identification of race, sex, and ethnic origin. Civil rights information regarding minorities and women was to be circulated. Earlier OMB memoranda gave examples only concerning minorities. Memorandum No. 71–53, *supra* note 30.

[53] OMB Memorandum No. 74–12, *supra* note 51. In addition, OMB staff was formally advised for the first time that useful information and data on civil rights were available from nongovernmental minority and women's rights groups, although staff was not instructed to obtain this information itself.

[54] The Assistant Director for Management and Organization was instructed to undertake a review regarding agency civil rights data collection and to develop a program to improve the usefulness of such data. OMB Memorandum No. 74–12, *supra* note 51. In addition, staff was directed to assure that minorities and women have equal access to Federal executive training programs and to use the newly created management by objective system to strengthen Federal agency civil rights programs. Also incorporated into the listing of OMB civil rights concerns was implementation of OMB's own equal employment affirmative action plan, a responsibility of all OMB staff. OMB's first affirmative action plan was published in January 1972, and was thus not mentioned in Director Shultz's memorandum of March 1971. OMB staff was reminded of the 1972 affirmative action plan in OMB Office Memorandum No. 73–12 from Caspar W. Weinberger to OMB staff, "Civil Rights," with attachment, "Civil Rights Considerations," Oct. 19, 1972.

[55] OMB Office Memorandum No. 75–54, from James T. Lynn, Director, to OMB staff, "OMB Civil Rights Activities," May 16, 1975. This memorandum contained an attachment outlining major civil rights programs, such as Title IX of the Education Amendments of 1972 [20 U.S.C. §1681–86 (Supp. V, 1975)] which bars sex discrimination in any educational program receiving Federal assistance.

[56] The Interdepartmental Task Force of the National Commission on the Observance of International Women's Year (IWY) (1975) was established in January 1975 by Exec. Order No. 11832, 3 C.F.R. 106 (Supp. 1975). On Sept. 9, 1975, Director Lynn made a presentation to this Task Force in which he stated that OMB budget examiners would be "going after the women's issue pretty hard" during the budget review process. See Transcript, International Women's Year Interdepartmental Task Force, 36 (Sept. 9, 1975, 10:00-12:30). For an analysis of the performance of budget examiners in responding to Mr. Lynn's directive, see sec. III(B) *infra* .

[57] OMB Office Memorandum No. 76–14 (Oct. 22, 1975).

[58] *Id*

In December 1976, in response to this section, "Civil Rights Responsibilities," OMB made a number of comments, both specific and general. The specific comments have been incorporated throughout the section. These are OMB's general comments concerning this section:

> *Civil Rights Responsibilities of OMB* In general, the draft report overstates OMB's authority and responsibilities under Title VI of the Civil Rights Act of 1964 and the Executive orders issued in support of that Act. OMB does have a managerial role, but only to the extent that such a role is prescribed by law or by the President. Our responsibility for civil rights enforcement is comparable to our function under the Freedom of Information Act, the government in the Sunshine Act, or any other "housekeeping" or other laws which impose duties upon the heads of agencies and departments.
>
> The role of OMB as regards the civil rights laws is the same as its role as regards the national defense, the rights of labor to bargain collectively, the protection of the environment, and all other activities of the Federal government. The basic responsibilities for implementing these laws and public policies has been assigned by Congress to specific agencies. Civil rights, like a number of other "crosscutting" matters has been the subject of particular attention, but that attention does not, thereby, increase OMB's responsibility for the enforcement of law or the implementation of programs in these "crosscutting" areas.
>
> The draft report fails to recognize that fact—particularly in its comments on how certain OMB office memoranda have been implemented. The report could be improved if it were to focus clearly on what the cited office memoranda said and relate these assignments to OMB functions. . . .
>
> There are other aspects in which we feel the Civil Rights Commission report is misdirected. The report implies that OMB's budget role can directly influence the antidiscrimination performance of the agencies that we oversee. Taken in the extreme, this implies that if, for example, the Department of Agriculture does not maintain non-discriminatory hiring practices, we should recommend a cut in the food stamp program. The Civil Rights Commission should recognize that, in terms of budget oversight, while we have an influence, we do not control agency performance. Furthermore, we could not in good conscience recommend actions that would penalize beneficiaries of Federal programs in order to "punish" the administering agencies for poor civil rights performance.
>
> Another example of the report's misdirection is its focus on process and organization rather than on results. Issuing memoranda, establishing separate organizational units, including civil rights, references in OMB boilerplate, [sic] and asking specific questions in hearings will not necessarily produce results of lessened discrimination. Perhaps indicative of this attitude is that in the hearings on its own budget, the Civil Rights Commission was unable to specify the results of its activities. When pressed for such results oriented data, Commission officials pointed out the volume and number of their reports on agencies. Reports on agencies, fairly done, can be enlightening, but producing them is not the same thing as improving the civil rights of government employees and beneficiaries.[60]

As OMB has stated, it is the Commission's view that "OMB's budget role can directly influence the antidiscrimination performance of the agencies" that OMB oversees. In 1970, after an extensive review of the Bureau of the Budget, OMB's predecessor organization, this Commission noted:

> Although the Bureau of the Budget—through its central role in the budget submission process, its authority to review and comment on all legislative proposals, and its responsibility for approving agency data collection proposals—can play a significant role in improving the effectiveness of civil rights compliance and enforcement, it has failed to do so. . . .
>
> The Office of Management and Budget, which will replace the Bureau of the Budget under the President's recent reorganization plan, will focus on implementing national policy and evaluating the results of agency efforts to carry out its program assignments. This will permit the new Office to become more deeply involved in agency activities implementing national civil rights policy, including evaluation of the civil rights implications of agency programs and coordination of agency civil rights efforts.[61]

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[59] *Id.*

[60] Oaxaca letter, *supra* note 22.

[61] 1971 *Enforcement Effort* report, *supra* note 3.

Such involvement is badly needed by the Federal Government. In a series of reports on Federal agency civil rights enforcement, this Commission has found a serious failure of Federal agencies to fully implement civil rights laws. This Commission has documented such weaknesses as absence of preaward reviews, inadequate investigations, backlogs in complaint handling, protracted negotiations, lack of direction, inconsistent policies and standards, and deficient guidelines and regulations. As a result of such problems, the Federal Government has not made sufficient progress in protecting the right of minorities and women to an equal opportunity to participate in American society in such roles as employees, renters, homeowners, borrowers, and entrepreneurs.

Some of our recommendations for the strengthening of the Federal effort to end discrimination have been for major changes. We urged the consolidation of all employment responsibilities in a single agency and the reassignment of responsibilities under the general revenue sharing program. Many of our recommendations, however, were ones which agencies could undertake themselves. For example, we have encouraged the adoption of time frames for conducting reviews and investigations, engaging in negotiations, and taking sanctions. We have urged the adoption of guidelines which make clear to the public what actions are prohibited by various civil rights statutes, including the general revenue sharing legislation and Title VI of the Civil Rights Act of 1964. While there has been some progress in the past few years, many of the deficiencies we have reported still remain. It is our view that it would be appropriate for OMB to use its management and budget roles to encourage agencies to make the necessary improvements. We believe that we have fairly stated OMB's role under Federal civil rights law.[62]

There is another key judgment OMB made about this Commission's position with which we do not agree. OMB contends that this Commission's view "implies that if, for example, the Department of Agriculture does not maintain non-discriminatory hiring practices, we should recommend a cut in the food stamp program." This is not an example of the role we envision for OMB.[63] Nonetheless, we do believe that OMB should exercise authority with regard to the funding of Federal civil rights offices. For example, we would hope that OMB ensures that Federal agency budget requests are sufficient for implementing Federal civil rights policy. Similarly, OMB should ensure that agency civil rights programs merit the funds they are receiving. OMB might well inform an agency that it must make certain improvements which required little or no additional resources before OMB would concur in a request for increased funding. OMB might also recommend a cut in funds for an agency civil rights program if that program provided no positive results for minorities or women and did not respond to recommendations for improvement.[64]

II. ORGANIZATION AND STAFFING

A. General

OMB's organization as of September 1976 dated substantially from the spring of 1973,[65] shortly after Director Ash and Deputy Director Malek were appointed and the new management by objective system[66] was announced.[67] One of the prime goals in the reorganization was to give added emphasis to the management and evaluation of Federal programs.

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[62] In response to OMB's specific allegation that the draft of this report which it reviewed "overstates OMB's authority under Title VI of the Civil Rights Act of 1964 and the Executive orders issued in support of that Act," we have the following observations. The draft report contained no reference to Executive Orders No. 11247 or 11764, the Executive orders issued in support of Title VI. In the section of the report in which this Commission described the civil rights responsibilities which it believes are OMB's, there is only one reference to Title VI, where we note without comment that former OMB Director Shultz provided OMB staff with instructions as to how to conduct a review of the enforcement of several civil rights laws, including Title VI.

We note that in a 1975 report, *The Federal Civil Rights Enforcement Effort, Vol. VI, To Extend Federal Financial Assistance*, this Commission recommended that the President issue an Executive order transferring to the Office of Management and Budget the responsibility for providing Title VI coordination and direction, which is currently vested in the Attorney General under Executive Order No. 11764. This was, however, a recommendation to the President, which as of early January 1977 had not been adopted, and thus in this report, the Commission specifically did not use that recommendation as a standard for evaluating OMB performance.

[63] We have not recommended that Federal agency violations of civil rights law be remedied by cuts in a program which is administered by that agency and which provides assistance to State and local agencies or other recipients. We have, however, urged termination of Federal assistance to certain recipients, as opposed to cuts in the entire Federal budget for a congressionally mandated program, who persist in violating Federal civil rights law. Such termination would be initiated by the Federal agency administering the assistance program; it would be accomplished through an administrative process under the law which had been violated; and thus it would not require an OMB recommendation to the President that a program be cut.

[64] While it is not central to our evaluation of OMB, this Commission notes that OMB's allegation that "in the hearings on its own budget, the Civil Rights Commission was unable to specify the results of its activities" is inaccurate. At its budget hearings, the Staff Director of this Commission stated that about 60 percent of this Commission's recommendations have been adopted. He discussed the impact of some specific recommendations, such as the impact of the Commission recommendations for extensions of the Voting Rights Act and the effect of the extensions on the number of black elected officials in the South.

[65] This organization was announced to OMB employees by OMB Office Memorandum No. 73-39, Mar. 6, 1973, to become effective Apr. 16, 1973. The purposes of the organization were fourfold: to reduce OMB involvement in matters handled more effectively elsewhere, to redistribute workloads more evenly, to establish the budget and legislative review functions as stronger tools of management, and to free resources in order to concentrate on improving the management and evaluation of Federal programs. *Id.* Contemporaneously, by Executive order, a number of

As shown in exhibit 2.1, OMB had three Assistant Directors and five Associate Directors who reported directly to the Deputy Director. The responsibilities of these eight people defined the major organizational units within OMB.[68] The three Assistant Directors presided over the Budget Review Division, the Executive Development and Labor Relations Division, and the Legislative Reference Division.

The Budget Review Division was responsible for overseeing the preparation of the budget document; this responsibility included issuing OMB Circular A-11, which governs agency budget submissions.[69] The Executive Development and Labor Relations Division developed programs to recruit, train, motivate, deploy, and evaluate Federal career personnel; it also was responsible, with the Civil Service Commission, for providing policy guidance to Federal agencies on their labor-management relations. The Legislative Reference Division was responsible for overseeing the preparation of administration views on legislation introduced in the Congress and cleared agency legislative proposals and testimony regarding legislative proposals.

The Associate Director for Management and Operations was responsible for overseeing five major OMB Divisions: (1) the Evaluation and Program Implementation Division, responsible for helping Federal agencies to improve evaluation of their program performance and efficiency; (2) the Information Systems Division, responsible for developing information systems to provide performance data on Federal programs; (3) the Intergovernmental Relations and Regional Operations Division, directed at improving the Federal relationship with State and local governments;[70] (4) the Organization and Special Studies Division, responsible for studying management problems and for recommending and implementing changes in the organization of the executive branch; (5) the Statistical Policy Division, directed to improve and coordinate Federal statistical services and review for clearance all agencies' reporting requirements.

The remaining four Associate Directors[71] were responsible for overseeing 12 divisions charged with reviewing budget and management operations of specific program areas of Federal agencies. In late 1975 there were eight divisions responsible for reviewing and examining budget requests, operating methods, and legislative proposals as follows:

(1) International Affairs Division: the Department of State, Agency for International Development, and other foreign affairs agencies;

(2) National Security Division: the Department of Defense, including the Defense Supply Agency and the Departments of the Army, Navy, and Air Force:

(3) Human Resources Division: the Departments of Labor and Health, Education and Welfare;

(4) Community and Veterans Affairs Division: the Department of Housing and Urban Development, the Veterans Administration, ACTION, and several independent agencies, including the Equal Employment Opportunity Commission and the U.S. Commission on Civil Rights;

(5) Economics and General Government Division: the Departments of Justice, Commerce, Transportation, and the Treasury as well as the Civil Service Commission, General Services Administration, Postal Service, Small Business Administration, and numerous independent agencies such as the Federal Trade Commission;

(6) Natural Resources Division: most programs of the Department of the Interior, as well as all of the activities of the Environmental Protection Agency, the Federal Power Commission, and other related agencies;

(7) Energy, Food, and Analysis Division: the Department of Agriculture, the Federal Energy Administration, the Federal Power Commission, and

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functions were transferred to the General Services Administration and to the Department of Commerce. See Exec. Order No. 11717, May 9, 1973, 38 *Fed. Reg.* 12315 (1973), and a statement by President Nixon on the subject, 9 *Weekly Compilation of Presidential Documents* 692 (May 28, 1973). Only minor changes were made in OMB's organization between March 1973 and January 1976. See, e.g., OMB Office Memorandum No. 75-13, Nov. 8, 1974 (reassigning responsibilities within the divisions overseen by the Associate Director for Natural Resources, Energy, and Science).

[66] The management by objective system is discussed in sec. IV *infra*.

[67] Letter from Richard M. Nixon, President, to the heads of 21 executive departments and agencies, Apr. 18, 1973.

[68] Office of Management and Budget, Functions and Organization (January 1974).

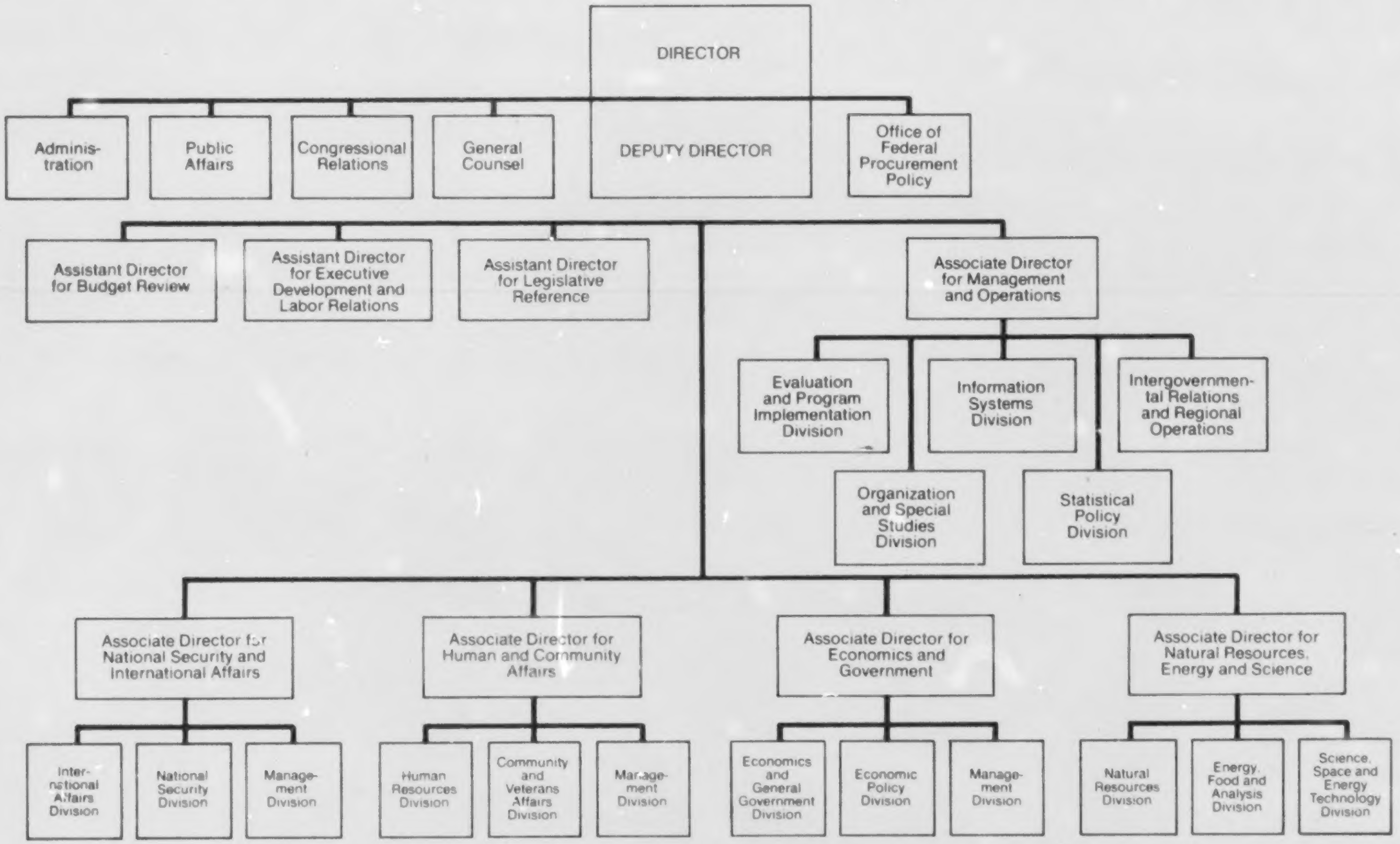
[69] This division also coordinated and participated in the development of tax, credit, and fiscal policies.

[70] This division's responsibilities included assessing the intergovernmental impact of proposed policies and providing coordination and staff support to the Federal Regional Councils and the Federal Executive Boards. FRCs are discussed in ch. 3 *infra* and FEBs in ch. 4 *infra*.

[71] These Associate Directors, who were sometimes termed "Program Associate Directors" or "PADs," were appointed by the President. These positions were created in 1970 to form a new level of politically appointed officers over the division chiefs, who are selected through the civil service. For one analysis of the impact of the creation of the four PAD positions, see Heclo *supra* note 11, at 85-86.

Exhibit 2.1

Office of Management and Budget Organization Chart


DIRECTOR
Adminis-tration
Public Affairs
Congressional Relations
General Counsel
DEPUTY DIRECTOR
Office of Federal Procurement Policy
Assistant Director for Budget Review
Assistant Director for Executive Development and Labor Relations
Assistant Director for Legislative Reference
Associate Director for Management and Operations
Evaluation and Program Implementation Division
Information Systems Division
Intergovernmental Relations and Regional Operations
Organization and Special Studies Division
Statistical Policy Division
Associate Director for National Security and International Affairs
Associate Director for Human and Community Affairs
Associate Director for Economics and Government
Associate Director for Natural Resources, Energy and Science
International Affairs Division
National Security Division
Management Division
Human Resources Division
Community and Veterans Affairs Division
Management Division
Economics and General Government Division
Economic Policy Division
Management Division
Natural Resources Division
Energy, Food and Analysis Division
Science, Space and Energy Technology Division

Source: *The Federal Directory*, 3rd Edition, 1975 the energy and minerals programs of the Department of the Interior; and

(8) Science, Space, and Energy Technology Division: The Energy Research and Development Administration, the Nuclear Regulatory Commission, the National Aeronautics and Space Administration, the Smithsonian Institution, and the National Science Foundation.[72]

The prime responsibility of these divisions was recommending the allocation of funds to Federal agencies. Each examiner was responsible for evaluating past spending and program effectiveness and assessing proposals for spending with respect to the assigned agency or activity. Budget examiners assisted in the review of agency proposals for legislation and changes in reporting requirements. They were responsible for identifying and following up on issues and problems perceived within the organization, administration, and operation of their agencies' programs. In this regard, they were from time to time involved in short term studies or projects.

In addition to the budget examining divisions, separate management divisions were assigned to three of the four Associate Directors. These divisions assisted in the analysis and development of management systems and objectives of the agencies assigned to the other divisions grouped under their respective Associate Director. They were primarily responsible for reviewing agency submissions of tentative Presidential objectives for the management by objective system and for monitoring progress through reports submitted by the agencies.

The Office of the Director of OMB provided direction and coordination for all OMB activities. Included in this office was the General Counsel, who cleared proposed Executive orders and Presidential proclamations, and Assistants who provided a liaison role for the Director on congressional relations, public affairs, and administrative matters.

The Office of Federal Procurement Policy (OFPP) was established by Congress in 1974 to provide Government-wide direction over procurement policies. OFPP's duties include determining uniform procurement policies and procedures for implementing numerous social objectives, such as the promotion of equal employment opportunity and support of minority-owned enterprise.

B. Civil Rights Staffing

1. The Deputy Director and Associate Director for Human and Community Affairs

One of the responsibilities of OMB's Deputy Director was overall coordination and monitoring of the OMB civil rights effort.[73] As of April 1976, OMB's Deputy Director was Paul H. O'Neill, who also served as the Director of OMB's equal employment opportunity program.[74] In May 1975 he met with the Leadership Conference on Civil Rights[75] to discuss several concerns of that organization, including the number of OMB staff having civil rights oversight responsibilities, the need for OMB monitoring of the civil rights impact of agency programs and collection of racial and ethnic data, as well as OMB's position on the Revenue Sharing program and the performance of the Department of Justice in coordinating enforcement of Title VI.[76] Mr. O'Neill agreed to meet with these civil rights representatives the following August and indicated a desire to meet with them on a more regular basis in the future.[77] However, as of August 1976, no subsequent meeting had been held or scheduled.[78] In March 1976, the Deputy Director indicated that although he had not called any other meetings with civil rights organizations since May 1975, he had participated in meetings at the White House attended by civil rights leaders and he had met regularly with Arthur S. Flemming, Chairman of this Commission.[79]

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[72] Office of the Assistant to the Director for Administration, OMB, Detailed Statement of Functions by Division (1975).

[73] OMB Office Memorandum No. 75-54, *supra* note 55. As of September 1976, this was the most recent OMB memorandum outlining the civil rights responsibilities of OMB staff.

[74] OMB Office Memorandum No. 75-12, Oct 23, 1974. Before becoming Deputy Director, Mr. O'Neill was Associate Director for Human and Community Affairs.

[75] The Leadership Conference on Civil Rights is a coalition of national labor, civil rights, and civic organizations and associations formed to promote the rights of minorities and women. A previous meeting between the Leadership Conference and former Deputy Director Frederic V. Malek was held in June 1973. At that meeting, the following topics were discussed: the Department of Justice coordination of Title VI enforcement, collection of racial and ethnic data, civil rights enforcement by the Office of Revenue Sharing, and Federal agency civil rights policies. Letter and attachment from Harold C. Fleming, chairman, Federal Programs Task Force, Leadership Conference on Civil Rights, to Frederic Malek, Deputy Director, Office of Management and Budget, July 23, 1973. A summary of these issues, written prior to the meeting, was also listed in memorandum from Harold C. Fleming to members of the Federal Programs Task Force, "Meeting with OMB Deputy Director Malek," undated. As a result of the meeting, Deputy Director Malek arranged for continuing liaison between OMB and the Leadership Conference through the Deputy Associate Director of OMB's Community and Veterans Affairs Division. See letter from Harold C. Fleming, chairman, Federal Programs Task Force, Leadership Conference on Civil Rights to Frederic Malek, Deputy Director, OMB, Nov. 12, 1973.

[76] Memorandum from Harold C. Fleming to members of the Federal Programs Task Force, "O'Neill Meeting Follow-up," June 13, 1975.

[77] Letter from Harold C. Fleming, chairman, Federal Programs Task Force, Leadership Conference on Civil Rights, to Paul H. O'Neill, Deputy Director, OMB, June 13, 1975 (confirming the substance of the May 19, 1975, meeting).

[78] Telephone interview with Morton Sklar, attorney, Center for National Policy Review, Aug. 20, 1976. Mr. Sklar stated that following the May 1975 meeting, the Deputy Director had not responded to the Leadership Conference's requests, even those which were merely for information.

The Associate Director for Human and Community Affairs had been delegated "leadership responsibilities"[80] in OMB's civil rights program.[81] This civil rights leadership post was vacant for 1-1/2 years after Mr. O'Neill was promoted from Associate Director to Deputy Director in October 1974. It was filled May 3, 1976, when Dan L. McGurk assumed the position.

2. Civil Rights Unit (CRU)

On March 25, 1971, OMB established a Civil Rights Unit within its General Government Programs Division (GGPD). On the basis of OMB's accomplishments during the unit's first 5 months, this Commission commended OMB on its "notable progress in monitoring Federal civil rights enforcement"[82] and predicted that OMB would soon "become the single most important and effective mechanism in the Federal civil rights effort."[83] This prediction was never realized, however, and the fate of that unit illustrates a serious failure of a Federal agency to carry through its commitment for a strong civil rights program.

In April 1973 the staff of the unit were transferred from GGPD to the Community and Veterans Affairs Division (CVAD). Shortly thereafter an OMB memorandum made clear that many of the unit's most significant duties were also transferred to CVAD. In particular, the memorandum required CVAD to:

1. Exercise leadership responsibilities for OMB's civil rights program.[84]
2. Examine the budgets for a number of civil rights programs and agencies.
3. Continue publication of the *Special Analysis on Federal Civil Rights Activities*.[85]
4. Continue information sessions on civil rights for OMB staff.
5. Increase the flow of information between agencies with civil rights responsibilities and OMB staff.
6. Work with the Program Implementation and Coordination Division (PICD) in the conduct of selective reviews of civil rights policies and programs.[86]

These functions were gradually eroded from the unit's activities. By January 1976 in addition to preparing the *Special Analysis*, the unit was viewed as responsible only for two main functions: (1) responding to requests from OMB staff for civil rights information and (2) identifying and working on particular problem areas.[87] As a result of this viewpoint and the low staffing and status afforded the unit, by 1975 it had largely engaged in ad hoc projects and had failed to initiate systematic civil rights direction throughout OMB.[88] Further erosion continued, exacerbated by the departure from OMB, in the summer of 1976, of the sole examiner assigned to the unit. In September 1976, William Hamm, the Deputy Associate Director of the Housing, Veterans, and Labor Division,[89] stated that the only civil rights responsibilities vested with CVAD were the budget examination of certain civil rights programs and agencies and the preparation of the *Special Analysis*.[90] Indeed, the erosion of responsibility was so complete that, along with the former Deputy

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[79] Interview with Paul H. O'Neill, Deputy Director, Office of Management and Budget, Mar. 4, 1976. Mr. O'Neill also emphasized that his involvement with civil rights arises in much of his normal work, such as reviewing legislative programs to be proposed by the President. In particular, Mr. O'Neill indicated, he looked carefully, in February 1976, at the civil rights provisions included in the President's proposals for block grant programs. *Id*.

[80] OMB has not defined this term. See OMB Office Memorandum No. 75-54, *supra* note 55.

[81] OMB Office Memorandum No. 75-54, *supra* note 55.

[82] *One Year Later*, *supra* note 27, at 207.

[83] *Id*. at 209.

[84] The full extent of this program is discussed in sec. I(B) *supra*.

[85] The *Special Analysis* is discussed briefly in sec. III, *infra*

[86] OMB Office Memorandum No. 74-12, *supra* note 51. These duties had also been assigned to the other unit when it was within the General Government Programs Division. OMB Office Memorandum 71-53, *supra* note 30.

[87] Telephone interview with James B. Robinson, budget examiner, Community and Veterans Affairs Division, OMB, Jan. 19, 1976 [hereinafter referred to as 1976 Robinson interview].

[88] The Deputy Associate Director for the Community and Veterans Affairs Division, Donald A. Derman, indicated that the unit had played the role of a "gadfly." Interview with Donald A. Derman, Jan. 29, 1976. OMB stated: "The term 'gadfly' was used to describe the process of continually reminding OMB staff of the inputs required in the budget process on civil rights activities." Oaxaca letter, *supra* note 22.

[89] This Division, created in 1976, was formerly CVAD. The Deputy Associate Director is William Hamm.

[90] Interview with Dan L. McGurk, Associate Director for Human and Community Affairs, Donald A. Derman, Deputy Associate Director for Human Resources, and William Hamm, Deputy Associate Director for Housing, Veterans, and Labor, OMB, Sept. 27, 1976.
OMB stated:

> This is neither an accurate representation of what [William Hamm] told the interviewer. . . nor a correct statement of the Division's responsibilities. In the interview, he stated that HVLD also had coordination responsibilities for civil rights on an agencywide basis. Oaxaca letter, *supra* note 22.

This is not what was represented to Commission staff members who interviewed Messrs. McGurk, Derman, and Hamm. Mr. Derman explicitly stated that the assignment of the one staff member who believed he was a member of the Civil Rights Unit was to be the budget examiner for the Equal Employment Opportunity Commission and the Civil Rights Commission. During that interview, Commission staff were also informed that "his only responsibilities with regard to other examiners" was to make sure that they "were aware of their responsibilities with regard to the civil rights *Special Analysis*." OMB representatives stressed that there was no need for a

Associate Director, Community and Veterans Affairs Division,[91] he asserted that there was no civil rights unit in CVAD and that there had not been such a unit since April 1973.[92] Mr. Hamm's statement reflects OMB's official position on this matter as of December 1976. OMB informed this Commission:

> There is a good deal of confusion, which is reflected in the draft report. . ., over whether or not a "civil rights unit" existed between 1973 and 1976. The facts are as follows:
>
> On April 16, 1973, examining and coordination responsibilities for civil rights were transferred from GGPD to the newly-created Community and Veterans Affairs Division, where they were assigned to the Community Branch. Thus, although there continued to be a unit with civil rights responsibilities, there was no separate "Civil Rights Unit," as such, subsequent to April 16, 1973.
>
> There were 2 examiners assigned to civil rights activities in CVAD through approximately January 1976 and at that time the remaining one was reporting directly to the Deputy Associate Director. In the summer of 1976, HLVD was created and those same civil rights responsibilities were lodged in that division.[93]

Although as of December 1976 OMB was stating that there had been no identifiable Civil Rights Unit since April 1973, this does not appear to have been OMB's consistent position. Earlier OMB represented to this Commission,[94] to OMB staff,[95] and to the Leadership Conference on Civil Rights[96] that the unit existed.

As of March 1976, OMB's position was that there had been no "flagging" of effort as a result of CRU staffing and, further, that there was not sufficient justification for increasing that unit's size.[97] Civil rights goals, the Deputy Director said in March 1976, can best be accomplished by insisting that all OMB staff have civil rights responsibilities.[98] Nevertheless, as will be discussed in subsequent sections of this chapter, no systematic civil rights direction is provided staff as to how fully to execute these responsibilities.

The unit was so insignificant it did not appear on OMB's official organization chart.[99] It was composed of staff which, in addition to having unit responsibilities, performed the budget examining

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Civil Rights Unit to provide direction to OMB staff because this function "is incorporated into the *Examiners' Handbook*."

[91] *Id*. This was Donald A. Derman.

[92] McGurk interview, *supra* note 90.

[93] Oaxaca letter, *supra* note 22.

[94] On July 2, 1973, the Director of OMB wrote to this Commission:

> The location of the Civil Rights Unit has been changed to the Community and Veterans Affairs Division (CVAD) but it still remains under the Program Associate Director for Human and Community Affairs. It is staffed by two full-time examiners who work under the direct supervision of a Branch Chief who devotes a substantial portion of his own time to civil rights activities. OMB response, *supra* note 42.

In January 1976, Commission staff discussed with Deputy Director O'Neill the need for additional staffing in the Civil Rights Unit. Mr. O'Neill stated that it was his view that additional staffing was not necessary. He did not state that the unit did not exist. O'Neill interview, *supra* note 79.

In July 1974 one of the examiners in that unit wrote to Commission staff about the "Civil Rights Unit accomplishments in these past 15 months" [since April 1973]. Letter from James B. Robinson, budget examiner, CVAD, OMB, to Cynthia N. Graae, Assistant Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 30, 1974.

[95] In May 1975 OMB Director James T. Lynn informed OMB staff that "Additional [to that provided in Mr. Lynn's memorandum] information on civil rights can be obtained from the Civil Rights Unit, CVAD." OMB Office Memorandum 75-54, *supra* note 55. There were OMB staff who believed that they worked in the Civil Rights Unit. Telephone interview with Charlene Currie, budget officer, Medicaid, HEW, and former budget examiner, Civil Rights Unit, CVAD, OMB, Oct. 4, 1976. See also July 1974 Robinson letter, *supra* note 94.

[96] The counsel for the Leadership Conference on Civil Rights Federal Programs Task Force stated:

> In all the discussions with OMB Associate Directors that the Leadership Conference has held in the past 5 years, it was stressed to us that OMB maintained an active civil rights staff with concrete responsibilities to assure that all OMB personnel followed civil rights requirements. It now appears that OMB never believed its civil rights responsibilities were important and that its "creation of a civil rights unit" was a way of making these responsibilities disappear. This lack of commitment is a further indication that OMB cannot provide civil rights oversight unless it establishes a high level civil rights office with clear responsibilities over other budget and management staff. Telephone interview with Morton H. Sklar, counsel, Leadership Conference on Civil Rights Federal Programs Task Force, and attorney, Center for National Policy Review, Oct. 4, 1976.

OMB stated, "[This] footnote. . .which references active civil rights staff is correct. The term *staff* is generic and does not imply a *unit* or an *office*." Oaxaca letter, *supra* note 22.

[97] O'Neill interview, *supra* note 79.

[98] *Id*.

[99] Not even the Community Affairs Branch of the CVAD, within which the CRU was located, appears in OMB's official organization chart. See exhibit 2.1. OMB's organizational structure put three persons between the CRU and the Deputy Director: a branch chief, the Deputy Associate Director for Community and Veterans Affairs, and the Associate Director for Human and Community Affairs. Further, the status of the unit, as perceived by OMB staff, appeared to have decreased since the 1973 reorganization of OMB when CRU was removed from the Economics and General Government Division (EGGD) and placed in the CVAD; this change projected the impression that OMB's civil rights concern was more a matter of community affairs and human relations than of government operations and law enforcement. The perceived authority of the CRU within OMB stemmed partially from its own budget examination responsibilities. Interview with James B. Robinson, budget examiner, Community and Veterans Affairs Division, OMB, July 23, 1974 [hereinafter referred to as 1974 Robinson interview]. This authority was also eroded. After the Civil Rights Unit was moved from the EGGD, it lost its budget examination responsibilities for the Civil Rights Division and the Community Relations Service of the Department of Justice. OMB Office Memorandum No. 74-76 (unsigned) to OMB staff, "Program Divisions' Assignments," May 14, 1974.

function for two agencies.[100] OMB had, until August 1975, allocated more than one person year to civil rights activities to be carried out by two full-time examiners.[101] A serious deficiency in OMB's civil rights program was the unit's size. Clearly a staff of two is inadequate for any serious leadership and monitoring of the OMB civil rights effort.[102] This deficiency was worsened in the summer of 1975 by the departure of one examiner in the CRU. As of February 1976, there were no plans to fill this vacancy.[103] As a result, the unit's activities, which were already limited, appeared to have been even more sharply curtailed.

Prior to fiscal year 1976, the unit carried out its civil rights coordination responsibility primarily by making personal contact with budget examiners and sponsoring training seminars for examiners as well as by attending budget hearings concerning agencies with major civil rights responsibilities. CRU, as the unit responsible for developing *The Special Analysis on Federal Civil Rights Activities* issued annually with *The Federal Budget* , had the responsibility, through the Community and Veterans Affairs Division (CVAD) to "take the lead in coordinating with other affected divisions"[104] concerning budget review of civil rights activities.

During calendar year 1974, for example, CRU staff attended 15 budget hearings on agencies assigned outside the Community Branch and sponsored 3 civil rights training sessions for examiners.[105] In calendar year 1975, CRU was unable to attend any budget hearings outside its branch or to sponsor any training sessions. In late 1975, the sole examiner in CRU expected that, due to understaffing of the unit, the portion of his time allocated to consultation with examiners on civil rights concerns would fall from 15 percent in fiscal year 1975 to less than 5 percent by the end of fiscal year 1976.[106]

The unit also conducted special research projects on an ad hoc basis.[107] In addition, the CRU wrote speeches, answered correspondence, assembled factsheets for the White House and the Director's Office, and prepared responses to White House inquiries relating to civil rights.[108] CRU also reviewed most legislation with civil rights implications passing through OMB's Legislative Reference Division and many information forms with civil rights implications submitted to OMB's Statistical Policy Division. During fiscal year 1975, the CRU examiner spent approximately 30 percent of his time reviewing legislation and responding to congressional inquiries.[109] OMB noted:

> In fact HVLD continues to be responsible for those activities pertaining to civil rights described [in the previous two paragraphs] of the draft report—including writing speeches, answering correspondence, assembling fact sheets,

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[100] Interview with James B. Robinson, budget examiner, Community and Veterans Affairs Division, OMB, Oct. 20, 1975 [hereinafter referred to as 1975 Robinson interview]. The agencies assigned to the unit were the Equal Employment Opportunity Commission (EEOC) and the U.S. Commission on Civil Rights.

[101] *Id*.

[102] The Commission has commented on this deficiency in *Reassessment* report *supra* note 27, at 35–36; and *One Year Later Report* , *supra* note 27, at 195. In the summer of 1972, OMB indicated that it was considering increasing the size of the CRU staff. Response to a Commission questionnaire of July 1972 contained in letter from Caspar W. Weinberger, Director, OMB, to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Aug. 3, 1972. By the following spring, a decision had been made not to increase the staff. OMB stated that "with the assistance of the new management associates for special projects the two examiners would be able to handle their responsibilities adequately." OMB response, *supra* note 42.

[103] Derman interview, *supra* note 88. Mr. Derman indicated that the vacancy would be filled if the workload assigned to the incumbent CRU staff member increased.

[104] OMB, *Budget Examiners' Handbook* , Section 412. The *Examiners' Handbook* is a looseleaf guidebook containing basic instructions and sample formats governing most activities in which OMB examiners engage. Commission staff reviewed the *Handbook* in January 1976, and any revisions made after January 1976 are not reflected in this report's analysis.

[105] 1975 Robinson interview, *supra* note 100. In fiscal year 1975, one CRU examiner estimated he had some contact on civil rights matters with 75 to 85 of the 118 budget examiners in a year's time; the other estimated that such contact occurred with 35 or 40 examiners. 1974 Robinson interview, *supra* note 99 and interview with Charlene Currie, budget examiner, Community and veterans Affairs Division, OMB, July 26, 1974.

[106] 1975 Robinson interview, *supra* note 100. Mr. Derman indicated in January 1976 that he was not aware that the CRU believed it was understaffed. Derman interview, *supra* note 88.

[107] For example, in fiscal year 1974, the CRU made presentations on sex discrimination before a National Federal Executive Board Conference on Women, two Denver FEB conferences on Upward Mobility, the Federal Aviation Administration (Department of Transportation) Women's Group, the General Services Administration's Women's Group, the United States Information Agency's Women's Group, the Women's Action Organization of the Department of State, and the Agency for International Development. In addition, the Civil Rights Unit provided staff assistance to the Equal Employment Opportunity Coordinating Council (EEOCC) during its deliberations on uniform employee testing and selection procedures. (The EEOCC is discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. V: To Eliminate Employment Discrimination* 574–616 (1975) [hereinafter referred to as *To Eliminate Employment Discrimination*]). One CRU staff member participated in a 1973–74 OMB study of the collection of racial and ethnic data by Federal agencies. Moreover, the Civil Rights Unit commented on the civil rights aspects of proposed or pending legislation and reviewed approximately 100 forms for use in data collection on civil rights issues. The unit also worked with examiners on equal employment opportunity issues and other matters arising in connection with a number of agencies, such as the Department of Transportation, ACTION, Federal Communications Commission, the Department of Defense, the General Services Administration, and the American Revolution Bicentennial Commission. CRU staff also assisted in briefings on civil rights for OMB leadership and in responding to inquiries from staff in the Executive Office of the President. Robinson letter, *supra* note 94; 1974 Robinson interview, *supra* note 99; and 1974 Currie interview, *supra* note 105.

[108] For example, CRU provided staff support for the White House project on the problem of the Arab boycott. 1975 Robinson interview, *supra* note 100.

[109] *Id*.

and preparing responses to inquiries concerning civil rights.[110]

In addition to insufficient staffing, CRU lacked adequate authority to ensure the effectiveness of OMB's civil rights programs. For example, OMB supervisors have been instructed to include in their assessment of the performance of OMB staff an evaluation of the extent to which staff have been executing their civil rights responsibilities. OMB informed its staff, "Responsibility for being familiar with the Office's civil rights posture remains with each individual staff member and achievement in this area will be monitored by supervisors as part of their total supervisory responsibilities."[111] CRU staff, however, did not know if this responsibility had been implemented, since it was not permitted to review the performance evaluations of other OMB staff.[112]

C. Civil Rights Training for OMB Staff

OMB budget examiners received training in budget processes through courses conducted by the Civil Service Commission.[113] No instruction on civil rights was included in these courses. Appropriate instruction for budget examiners might have included, for example, an explanation of how to use concepts set forth in OMB Bulletin 73-17;[114] how to conduct a thorough review of a Federal agency's civil rights operations; how data submitted for the *Special Analysis on Federal Civil Rights Activities* might be used to track progress in minority assistance programs and civil rights enforcement activities; and what information on civil rights output is needed to improve the *Special Analysis*.

From 1971 to 1974, OMB directors affirmed the appropriateness of civil rights information sessions for OMB staff.[115] Formal civil rights information sessions for all staff were held every year from 1971 through 1974.[116] For example, in August 1973, pursuant to a commitment made the previous June by then Deputy Director Malek to the Leadership Conference on Civil Rights,[117] OMB senior staff were briefed by OMB's Civil Rights Unit regarding their responsibilities under OMB's civil rights program.[118] This session produced at least one notable action at the divisional level: the Energy and Science Division approached CRU staff after the meeting for some further guidance and thereafter developed a written plan for incorporating civil rights responsibilities into its functions.

Attendance at information sessions was not mandatory[119] and averaged only about 50 persons. Overall, budget examiner attendance was proportionately more than twice as heavy as that of management personnel.[120]

As of February 1976, OMB Director Lynn had not issued any directives on civil rights training for OMB program staff. Thus, no similar formal civil rights information sessions were held in 1975 and none were scheduled for 1976.[121] OMB stated:

> There never were formal training sessions held for examiners. This is not to say there shouldn't be. CVAD did conduct orientation sessions at which selected guest speakers appeared and also held sessions for examiners responsible for providing input to the Special Analysis.[122]

III. BUDGET EXAMINATION

Much of the leverage and power of OMB lies in the budget process.[123] If an OMB budget examiner believed, for example, that an agency program was ineffective or did not produce the desired results or that a proposed agency initiative within that program is inconsistent with administration policy or objectives, then the budget examiner might recommend[124] to senior policy officials in OMB that the funding for that program may be reduced.[125] Through this leverage examiners could not only further one of OMB's prime missions—ensuring sound governmental spending—but they could identify policy issues such as civil rights and spur needed agency action. The budget examining process could thus serve as a forum for the identification and resolution of problems in the implementation of Federal civil rights protections.

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[110] Oaxaca letter, *supra* note 22.

[111] OMB Memorandum 74-12, *supra* note 51.

[112] 1974 Robinson interview, *supra* note 99. A performance evaulation is an annual assessment of individual Federal employee performance. OMB wrote to this Commission, "The personnel evaluation reference . . .relates to recruiting and hiring practices. There never was the intent to involve civil rights examiners to review individual personnel evaluations." Oaxaca letter, *supra* note 22.

[113] Interview with Charlene Currie, budget examiner, Civil Rights Unit, Community and Veterans Affairs Division, OMB, Aug. 1, 1974. Three 2-week courses are available to OMB budget examiners. These courses are open to budget office personnel in all Federal agencies. *Id*.

[114] This bulletin is discussed in note 50 *supra*.

[115] OMB Office Memorandum No. 71-53, *supra* note 30; OMB Office Memorandum No. 74-12, *supra* note 51.

[116] OMB response to a Commission questionnaire of Feb. 17, 1971, contained in a letter from George P. Shultz, Director, Office of Management and Budget to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Apr. 15, 1971; Weinberger letter, *supra* note 102; and interview with Charlene Currie, budget examiner, Community and Veterans Affairs Division, OMB, July 23, 1973.

[117] Deputy Director Malek's meeting with the Leadership Conference is discussed in note 75 *supra*.

[118] 1974 Robinson interview, *supra* note 99.

[119] The Civil Rights Unit, however, did send written notes to staff encouraging attendance and followed this up with telephone and direct contact in advance of each session. 1974 Currie interview, *supra* note 105.

[120] This information appears from attendance lists provided to this Commission in July 1974 by OMB.

[121] 1975 Robinson interview, *supra* note 100.

[122] Oaxaca letter, *supra* note 22.

[123] For a discussion of the budget process generally see A. Wildavsky, *Budgeting, A Comparative Theory of Budgetary Processes* (1975). With regard to the role of Congress, see R.F. Fenno, Jr., *The Power of the Purse: Appropriations Politics in Congress* (1966) and S. Horn, *Unused Power: The Work of the Senate Committee on Appropriations* (1970).

At the time the research for this report was conducted, the annual budget cycle began in the spring, approximately 18 months prior to the start of the fiscal year for which the budget was being developed.[126] The Spring Planning Review is designed to provide the OMB Director with a focus on long-range goals and policy issues facing each major agency, "cross-cutting" questions affecting more than a single agency, as well as fiscal and economic projections and their budgetary implications.[127] At these oral review sessions, the Director and agency officials reach agreement on such matters as new or revised agency objectives and dollar "planning targets."[128] After the planning targets have been cleared through the White House, they are reflected in policy letters sent to the major agencies in July.[129] Smaller agencies have not been provided with planning targets. The Spring Review has not in the past provided a forum for the discussion of civil rights policy or program issues.[130]

A. Budget Review Preparation

In June of each year, OMB issued Circular No. A-11,[131] which provided instructions and formats for agency budget submissions in the fall. Circular No. A-11 required agencies to include certain information, such as a description and justification of requested outlays for major objectives.[132] This information provided the basis for budget hearings and the OMB Director's Review, both of which were generally held in October and November. A budget hearing was a consultation between OMB staff—usually a program deputy associate director, branch chief, and budget examiner—and top officials of the agency in question to discuss the agency's proposed budget.[133] Following the hearing, the Director evaluated the agency's requests and projected goals and, on the basis of this review, made recommendations to the President.[134]

The focus of the budget review process has been primarily on major program goals.[135] In submitting their proposed budgets, agencies were instructed to select management objectives[136] according to criteria delineated in Circular No. A-11. For the 1977 budget, these criteria included the magnitude of the expected dollar outlay, the impact on the agency's management process, the question of productivity, and the relationship of the activity "to a cross-cutting national goal, such as energy, conservation, pollution control, reducing the rate of inflation, etc."[137] Civil rights was not mentioned as one of the national goals. Indeed, our analysis of the budget review process indicates that OMB did not succeed in its intent to include civil rights concerns in all of its functions.

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[124] OMB informed this Commission:

> Examiners do not make decisions; rather they are responsible for analyzing policy issues and alternatives. While recommendations typically accompany the analysis, decisions are made by the President, or by senior policy officials to whom the President has delegated responsibility for resolving issues. Oaxaca letter, *supra* note 22.

[125] Compromise or appeals to higher OMB authorities may become necessary. In 1973, for example, the Department of Housing and Urban Development (HUD) requested a large increase in funds for research. An OMB examiner questioned the gain to be derived from the research. HUD provided an answer unsatisfactory to OMB, and OMB communicated its dissatisfaction to HUD. The Secretary of HUD inquired whether the requested increase would be approved if the focus of the proposed research were changed. OMB replied affirmatively and so committed itself in writing. Interview with William McQuaid and William Hamm, budget examiners, Community and Veterans Affairs Division, OMB, July 25, 1973. Not only can a problem be carried to the attention of higher OMB authorities, but in the event that such an appeal does not result in a resolution of the problem, OMB has the responsibility of raising the issue to the White House or the President.

[126] In the past, this Spring Planning Review took place approximately 15 months prior to the beginning of the fiscal year for which the budget was being developed. Thus in the spring of 1974, plans began for the budget covering fiscal year 1976 beginning on July 1, 1975. The Budget and Impoundment Control Act of 1974, 31 U.S.C. §§665, 1400 *et seq.*, moved the beginning of the fiscal year 3 months later, to the first of October. Thus, the spring 1976 review focused on budget plans for the fiscal year beginning Oct. 1, 1978. For a brief description of the impact of the Budget and Impoundment Act on OMB, see J. Havemann, "Congress Report/Conferees approve Changes in Budgeting Procedures," 6 *National Journal Reports* 894 (June 15, 1974).

[127] *Budget Examiners' Handbook, supra* note 104, at sec. 301 *et seq.*

[128] *Id.* at sec. 307(A).

[129] *Id.* at secs. 307-09; and Derman interview, *supra* note 88.

[130] 1976 Robinson interview *supra* note 87. See also *Reassessment* report, *supra* note 27, at 21.

[131] Circular No. A-11, *supra* note 33.

[132] Other materials required in the submission included data on personnel, information on data processing systems, and figures on statistical, environmental, research and development, and "manpower" programs. *Id.* at 14, 23-33.

[133] *Budget Examiners' Handbook, supra* note 104, at secs. 441-44. Budget hearings are discussed in more detail in III(B) *infra*.

[134] *Budget Examiners' Handbook, supra* note 104, at sec. 451.

[135] *Id.* at sec. 441; and Derman interview, *supra* note 88.

[136] Management objectives are discussed more fully in sec. IV, *infra*.

[137] Circular No. A-11, *supra* note 33, at 29.

Significantly, agencies were not required to submit the detailed narrative, budgetary, and beneficiary information required for the *Special Analysis*,[138] prior to the substantive review by OMB.[139] Unless civil rights are selected as a major objective, submission of meaningful budget information on an agency's civil rights program may be delayed until after the President's final decisions on the agency's total budget.[140] Unless budget examiners specifically request civil rights information, the issue may never arise in the review process.

The *Budget Examiners' Handbook* did not instruct examiners to request such information; it merely suggested that in preparing for the review, examiners "will find it helpful to. . .review agency performance for the year just past, including. . .civil rights activities."[141] The *Handbook* also contained a brief instruction in its "Policy Coordination" section that examiners "should insure that general policies pertaining to the budget are reflected in legislative programs, statistical activities, ADP [Automated Data Processing] procurement and utilization, personnel policies, civil rights activities."[142] No guideline was provided, however, on how examiners should carry out this instruction.

Consequently, the performance of budget examiners, as will be discussed below, appears to have varied significantly with respect to their knowledge of the civil rights programs in their agencies and their approach to civil rights problems and issues. OMB's Deputy Director Paul H. O'Neill, who was responsible for overall coordination of OMB's civil rights effort,[143] indicated in March 1976 that although there was some "unevenness" in the civil rights performance of OMB during its budget review process, nevertheless it had made "an awful lot of progress" in this area in the last few years.[144] Overall, however, the many instances of poor examiner performance on civil rights made clear that OMB needed to provide much more guidance to its examiners if plans to make civil rights an integral part of all functions is to be carried out successfully. As of December 1976, OMB apparently concurred. OMB wrote to this Commission:

> In a positive vein, there is an area which the report covers and in which criticisms of OMB's performance may be valid; this involves the universal sensitivity of OMB examiners to civil rights matters. We have not done an optimum job of raising this sensitivity through training, guidelines, and exhortation. Clearly, we can and should do a better job in this area.[145]

During late 1975 and January 1976, Commission staff interviewed 25 OMB officials responsible for reviewing approximately 33 different programs for civil rights enforcement.[146] At the time of the interviews, the Commission had issued several *Feder-*

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[138] The detailed information for the *Special Analysis* included a description of the civil rights program, the clientele, and new directions in the program; indicators of achievement, such as change in the composition of beneficiaries or establishment of outreach facilities. Data on the budget estimates must be broken down into a number of detailed categories, including investigation, complaint conciliation, compliance reviews, legal enforcement, and technical assistance. *Id.* at 113.

OMB stated, "These submissions, which form the basis for the tables shown in the special analysis, reflect the results of the agency and OMB reviews described in section 13.2." Oaxaca letter, *supra* note 22. As can be seen from section 13, note 140 *infra*, OMB generally requested only very general civil rights information prior to the substantive review. This was especially true if the civil rights program did not have a separate appropriation and did not appear as a distinct item in the *Budget*.

[139] Circular No. A.-11, *supra* note 33, at 5. This issue is also discussed in *Reassessment* report.

[140] An instruction contained in a "General Policies" section of Circular No. A-11 directed agencies to:

> assure that estimates reflect full consideration of the administration's goals and responsibilities in the civil rights area. Such consideration should include, but not be limited to: equal employment opportunity, programs of Federal financial assistance (Title 6 of the Civil Rights Act of 1964), minority business procurement, affirmative action plans of Federal contractors, fair housing practices, and Federal deposits in minority banks. OMB, in its examination of agency submissions, will review plans and estimates for consistency with civil rights policies. *Id.* at 9 (section 13).

[141] *Budget Examiners' Handbook*, *supra* note 104, at sec. 428.

[142] *Id.* at Section 402.

[143] For a brief discussion of the civil rights role of the Deputy Director, see sec. II(b), *supra*.

[144] O'Neill interview, *supra* note 79.

[145] Oaxaca letter, *supra* note 22.

[146] The officials interviewed, the dates of the interviews, and the civil rights programs covered were as follows: Eugene B. Tryck, budget examiner, James N. Purcell, Treasury-Justice Branch Chief, Economics and Government Division, Oct. 28, 1975 (Department of the Treasury enforcement of Exec. Order No. 11246, Title VIII, and General Revenue Sharing equal opportunity requirements); Peter M. Fannon, budget examiner, Community and Veterans Affairs Division (CVAD), Oct. 28, and Nov. 6, 1975 (Federal Communications Commission enforcement of equal employment rules for cable operators, broadcast licensees, and common carriers); G. Phillips Hanna, Acting Deputy Associate Director, Human Resources Division; Allen Jackson, Education Branch Chief; David K. Kleinberg, Income Maintenance Branch Chief, Victor M. Zafra, Health Branch Chief, Adrienne L. Quenneville, Thomas K. Morgan, Barry White, budget examiners, Oct. 29, 1975 (Department of Health, Education, and Welfare, Office for Civil Rights enforcement of Title VI, Title IX, Exec. Order No. 11246, and Department of Labor enforcement of the Equal Pay Act, Exec. Order No. 11246, and Title VI in Employment and Training Development Programs) [hereinafter referred to as Hanna *et al.*, interview]; E. Franklin Warner and Thomas P. Grumbly, budget examiners, Energy, Food, and Analysis Division, Oct. 31, 1975 (Department of Agriculture enforcement of Title VI, and Exec. Order No. 11246); Jerolyn R. Lyle, budget examiner, Economics and Government Division, Oct. 30, 1975 (Civil Service Commission enforcement of Exec. Order No. 11478 and Title VII); James B. Robinson, budget examiner, Community and Veterans Affairs Division, Nov. 3, 1975 (Equal Employment Opportunity Commission enforcement of Title VII); Alan D. Powers, budget examiner, Natural Resources Division, Nov. 4, 1975 (Department of the Interior enforcement of Title VI, and Executive Order No. 11246); Roger S. Adkins, Transportation Branch Chief, Economics and Government Division, Joseph P. Mullinix, Sandra Gerson, budget examiners, Nov. 5, 1975 (Department of Transportation, Federal Highway Administration and Urban Mass Transportation Adminis-

al Civil Rights Enforcement Effort reports evaluating, in detail, approximately 13 civil rights programs included within the examiners' responsibilities.[147] These reports were issued between November 1974 and July 1975. In 6 of the 13 instances, the examiner did not know of the Commission's evaluation.[148] In two of the remaining instances, the examiner knew of the evaluation but had not read it.[149] One OMB official stated that it was not necessary, in his judgment, to read the Commission's evaluation of the civil rights programs in his agency; yet he was not familiar with some of the major deficiencies in that program[150] which the report could have called to his attention. In an additional five instances, examiners indicated that they had skimmed the Commission's evaluation of their agency's program but could not recall the Commission's major findings, nor had they raised with their agency the question of adopting any of the Commission's recommendations.[151]

According to OMB's Civil Rights Unit, these reports had been distributed to all relevant budget examiners.[152] In August 1976 a former member of that unit said there was a high turnover rate for OMB examiners, making it difficult for the unit to keep examiners informed. However, in at least half of those instances in which examiners were unaware of a major Commission report that was relevant to their area of examination, the examiners had been assigned to that area prior to the issuance of the Commission report. Further, if OMB is to be successful in its goal of incorporating civil rights concerns into all of its functions, it must develop some method of training new examiners to treat civil rights issues along with all other examiner duties. This should direct examiners to sources, such as this Commission's reports, which can assist them in their civil rights role.

Interviews with budget examiners also revealed that when they raised questions with agency officials regarding their civil rights programs, most examiners relied almost exclusively on information supplied by the agencies. Few examiners sought independent

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tration enforcement of Title VI, and Exec. Order No. 11246, as well as Civil Aeronautics Board and Interstate Commerce Commission oversight of employment practices of regulatees) [hereinafter referred to as Adkins *et al*. interview]; Ronald L. Bevensee, Frederick F. Fletcher, budget examiners, Community and Veterans Affairs Division, Nov. 7, 1975 (Veterans Administration enforcement of Title VI, Title VIII, Exec. Order No. 11246, and Title IX); Reardon Sullivan, Branch Chief (Navy), National Security Division (NSD), Eric Vaughn, budget examiner, NSD, Nov. 14, 1975 (Department of Defense enforcement of Exec. Order No. 11246); Nicholas Stoer, budget examiner, Economics and Government Division Dec. 1, 1975, telephone interview (Urban Mass Transportation Administration enforcement of Title VI); Janice T. Gilchrist, budget examiner, Community and Veterans Affairs Division, Jan. 23, 1976 (Department of Housing and Urban Development enforcement of Title VI, and Title VIII); James N. Purcell, Treasury-Justice Branch Chief, Economics and Government Division, Jan 27, 1976 (Department of Justice, Civil Rights Division coordination of enforcement of Title VI, and enforcement of various other civil rights laws, as well as Law Enforcement Assistance Administration enforcement of Title VI, and Exec. Order No. 11246); Michael V. Fasano, budget examiner, Economics and Government Division, Jan. 29, 1976 (General Services Administration enforcement of Exec. Order No. 11246, and Exec. Order No. 11512).

[147] These 13 programs were evaluated in the following volumes of the Commissions' *Enforcement Effort* report: (1) Federal Communications Commission (2) Interstate Commerce Commission (3) Civil Aeronautics Board: *The Federal Civil Rights Enforcement Effort—1974, Vol. I: To Regulate In The Public Interest*, (November 1974); (4) Department of Housing and Urban Development (5) Department of the Treasury (6) Veterans Administration (7) General Services Administration: *The Federal Civil Rights Enforcement Effort—1974, Vol. II: To Provide. . .For Fair Housing* (December 1974); (8) The Department of Health, Education, and Welfare (9) Veterans Administration: *The Federal Civil Rights Enforcement Effort—1974, Vol. III: To Ensure Equal Educational Opportunity* (January 1975); (10) Department of the Treasury, Office of Revenue Sharing: *The Federal Civil Rights Enforcement Effort—1974, Vol. IV: To Provide Fiscal Assistance* (February 1975); (11) Equal Employment Opportunity Commission (12) Civil Service Commission (13) Department of Labor: *To Eliminate Employment Discrimination*, *supra* note 107. At the time of most of the interviews, the Commission had not yet released its report evaluating seven programs for ensuring nondiscrimination in federally funded programs: *To Extend Federal Financial Assistance*, *supra* note 62. In addition, there were approximately 10 instances in which an examiner was responsible for reviewing an agency's enforcement of Exec. Order No. 11246, which had been only briefly evaluated by the Commission as a part of its review of the overall contract compliance program coordinated by the Department of Labor. Such agencies included the Departments of Defense, the Interior, the Treasury, Agriculture, and Transportation and the Veterans Administration. None of the examiners responsible for reviewing a contract compliance activity knew of the Commission's report evaluating the contract compliance program with the exception of the examiner in charge of reviewing the Office of Federal Contract Compliance Programs of the Department of Labor, which coordinates and sets standards for the enforcement of Exec. Order No. 11246.

[148] The Commission evaluations not known to examiners were the following: (1) Interstate Commerce Commission (2) Civil Aeronautics Board, *To Regulate in the Public Interest*, *supra* note 147. (3) General Services Administration (4) Veterans Administration (5) Comptroller of the Treasury, *To Provide. . .For Fair Housing*, *supra* note 147 (6) Veterans Administration, *To Ensure Equal Educational Opportunity*, *supra* note 147.

[149] The Commission evaluations known to but not read by examiners were (1) Department of Health, Education, and Welfare, Office for Civil Rights, Elementary and Secondary Education, and Higher Education, *To Ensure Equal Educational Opportunity*, *supra* note 147; and (2) Federal Communications Commission, *To Regulate in the Public Interest*, *supra* note 147.

[150] Hanna *et al.* interview, *supra* note 146. For example, the official did not know that HEW had failed to compile data by sex on class composition or school enrollment. See *To Ensure Equal Educational Opportunity*, *supra* note 147, at 265. This failure had precluded HEW from targeting for review those schools most likely to be systematically discriminating against females. See U.S. Commission on Civil Rights, Comments on Proposed HEW Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities 2 (July 1975).

[151] For example, the examiner responsible for reviewing the Department of Labor's enforcement of the Equal Pay Act did not know that the Commission had recommended that the act be rescinded. Hanna *et al*. interview, *supra* note 146. Subsequent to Commission interviews budget examiners responsible for reviewing the Office for Civil Rights of the Department of Health, Education, and Welfare (HEW) requested during the budget hearing that HEW respond to recommendations in the Commission's report, *To Ensure Equal Educational Opportunity*, *supra* note 147. Telephone interview with Allen Jackson, Education Branch Chief, Human Resources Division, OMB, Feb. 2, 1976.

[152] 1975 Robinson interview, *supra* note 100.

assessments or additional information from sources outside the agencies they examined.[153] Some examiners recognized the need for such information but did not know how to obtain it. As one senior examiner stated, he realized that he often received "self-serving" answers to his questions on civil rights, but he did not know what he could do beyond asking questions.[154] At least two examiners indicated that they relied on evaluation reports by the General Accounting Office,[155] and only two said they had any regular contact with representatives from civil rights organizations to seek their views on agency enforcement.[156] While some examiners appeared to have fairly regular contact with the OMB Civil Rights Unit,[157] others did not often seek advice from the unit on the civil rights programs of their agencies.

Thus, some examiners were not familiar with fundamental problems or issues affecting their agencies' enforcement of civil rights. At least two examiners, for example, were not aware of current litigation with a potentially significant impact on their agency's civil rights program.[158] Similarly, some examiners were not aware that their agencies had failed to issue regulations implementing civil rights responsibilities.[159]

Examiners who reviewed agency programs for enforcing Title VI of the Civil Rights Act of 1964[160] were especially uninformed. Title VI prohibits discrimination on the basis of race, color, or national origin in any federally funded program.[161] Some agencies have similar responsibilities with regard to sex discrimination.[162] Many of the examiners of agencies with Title VI responsibilities acknowledged that they did not have a clear understanding of what constitutes a Title VI violation nor how to assess whether a Title VI program was having any impact. These examiners noted that the lack of data on the racial and ethnic composition of beneficiaries of Title VI programs hindered the examiners' ability to analyze budget requests submitted by Title VI agencies.[163] Some examiners indicated that because there was so little information on the scope of the problem to be attacked by Title VI, they had shifted their focus to equal employment programs, for which there were more data.[164]

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[153] Hanna *et al* . interview; Fannon interview; Adkins *et al* . interview; Powers interview; Gilchrist interview, *supra* note 146.

[154] Powers interview, *supra* note 146.

[155] 1975 Robinson interview, *supra* note 100; Adkins *et al* . interview, *supra* note 146.

[156] 1975 Robinson interview, *supra* note 100. Interview with Allen Jackson, Education Branch Chief, Human Resources Division, OMB, Oct. 31, 1975; Mr. Jackson indicated he had regular contact with civil rights organizations working to improve the status of blacks and Spanish speaking Americans but that he did not maintain similar contact with women's rights organizations. Although few examiners had contact with civil rights organizations, interviews revealed that examiners frequently had contact with industry representatives. Adkins *et al* . interview and Sullivan interview, *supra* note 146.

[157] Hanna *et al* . interview; Adkins *et al* . interview; Bevensee and Fletcher interview; Gilchrist interview, *supra* note 146. These examiners appeared to have had contact with the Civil Rights Unit about 5 to 12 times per year. 1975 Robinson interview, *supra* note 100.

[158] The budget examiner for the Department of Housing and Urban Development (HUD) was not aware of Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), *cert. granted sub nom* . Hills v. Gautreaux, 425 U.S. 284 (1976), in which metropolitan-wide relief was ordered to eliminate housing discrimination caused in part, the court found, by HUD. Gilchrist interview, *supra* note 146. The significance of this case was discussed in a letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to the Honorable Robert H. Bork, Solicitor General, Jan. 20, 1975. The budget examiner for the Federal Communications Commission was not aware of National Organization for Women v. FCC, in which the FCC was being challenged for failing to hold hearings on broadcast licensees' employment practices found in probable violation of Title VII of the 1964 Civil Rights Act by the Equal Employment Opportunity Commission (EEOC). This case is discussed in *To Regulate in the Public Interest, supra* note 147 at 28. This same examiner believed the FCC should place more emphasis on monitoring the American Telephone and Telegraph Co. (AT&T) but was not aware of the extensive monitoring already conducted by the EEOC. Fannon interview, *supra* note 146. For a report on the EEOC monitoring, see R. Shaeffer, *Nondiscrimination in Employment 1973–75: A Broadening and Deepening National Effort* 4–6, 45–49 (1975); and P. Wallace, *The AT&T Case* , 341–42 (1975). On the other hand, examiners responsible for the Office for Civil Rights of HEW were aware of current litigation against that agency. Hanna *et al* . interview, *supra* note 146.

[159] For example, the examiners responsible for the Veterans Administration (VA) were not aware that VA had failed to issue regulations implementing its responsibilities under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681–86. Bevensee and Fletcher interview, *supra* note 146. Moreover, the examiner for the Department of Agriculture USDA did not know of USDA's possible Title IX responsibilities with regard to the Extension Service. Grumbly interview, *supra* note 146. See *To Extend Federal Financial Assistance* , *supra* note 62, at 38–45.

[160] See note 146 *supra* .

[161] Title VI enforcement is discussed extensively in *To Extend Federal Financial Assistance, supra* note 62.

[162] These agencies include the Departments of Agriculture, the Interior, Justice (Law Enforcement Assistance Administration), Labor (Employment Training Administration), and Transportation (Federal Highway Administration and Urban Mass Transportation Administration) as well as the Environmental Protection Agency. *Id* . at 38–45, 223–26, 274, 379–98, 405–06, 468–525, and 607–11. There have been a number of enactments banning sex discrimination in specific federally assisted programs. These include Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.* (Supp. V, 1975), applicable to any federally assisted educational program; the Omnibus Crime Control and Safe Streets Act of 1968 as amended by the Crime Control Act of 1973, 42 U.S.C. §§3701 *et seq* . §3766(c) (Supp. V, 1975) and the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§5601 *et seq* . (Supp. V, 1975), applicable to any programs funded under those acts; the Comprehensive Employment and Training Act of 1973, 18 U.S.C. §§665 (Supp. V, 1975), 29 U.S.C. §§801–802, 811–822, 841–851, 871–875, 881–885, 911–929, 951–956, 981–992 (Supp. V, 1975); 42 U.S.C. §2571 note (Supp. V, 1975) applicable to programs funded under the act; the 1973 Amendments to the Federal-Aid Highway Acts 23 U.S.C. §324 (Supp. V, 1975), applicable to programs funded by the Federal Highway Administration; and the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §1251 note (Supp. V, 1975), applicable to programs funded by the Environmental Protection Agency.

[163] Hanna *et al* . interview, Grumbly interview; Powers interview; Adkins *et al* . interview, *supra* note 146.

[164] Grumbly interview, Powers interview, *supra* note 146.

The examiner responsible for the Civil Rights Division of the Department of Justice (DOJ), which is charged with coordinating Title VI enforcement,[165] stated that he had considered attempting to play a role within OMB of providing examiners with information on Title VI programs Governmentwide. He acknowledged that "somebody clearly ought to take on the job,"[166] but said he did not think his branch was capable of the task due to a shortage of staff and high turnover. As of January 1976, he had not sought additional staff to provide such a coordination function within OMB.[167] Such a role might appropriately have been executed by the CRU, had it had a more direct relationship with the Civil Rights Division.[168]

Budget examiners were somewhat better informed about their agencies' contract compliance programs that enforce equal employment opportunity requirements of all major Federal contractors.[169] The budget examiner who was responsible for reviewing the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor, which coordinates contract compliance enforcement, provided a clearinghouse for all examiners on contract compliance activities.[170] OFCCP routinely collects data on the performance of compliance agencies, in terms of the percentage of contractors reviewed annually and information comparing agencies' staffing and resources to the number of contractors in their jurisdictions. The OFCCP budget examiner circulated to contract compliance examiners these data collected by OFCCP. He also circulated to examiners agency contract compliance programs' own recommendations to OFCCP on what their budgets should be. Thus, contract compliance programs within agencies had a separate and more direct access to OMB examiners than did most programs whose budget requests normally underwent screening and analysis first by their agency budget offices before reaching OMB. Most OMB contract compliance examiners indicated that they rely heavily on the figures supplied by the OFCCP budget examiner in assessing the needs of individual agencies.[171] However, some indicated that there could be better communication concerning such matters as the quality of reviews, enforcement activities, and OFCCP assignments of increased jurisdiction to compliance agencies.[172] None of the examiners questioned knew, for example, of the indepth performance evaluations conducted by OFCCP of the agency compliance programs during the summer of 1975.[173]

B. Budget Review Hearings

The *Budget Examiners' Handbook* indicated that the budget review hearing is to focus on major issues or problems and is not to be a factfinding activity.[174] Some hearings were relatively formal in nature, with detailed lists of questions submitted in advance to the agency.[175] Others placed more emphasis on advising the agency on the President's preliminary budget decisions, while others might have been designed primarily to allow the agency to discuss whatever subject it chose.[176] The program associate director and division heads were assigned responsibility for determining the type of hearing conducted.[177]

Based on the interviews with budget examiners conducted by Commission staff, it does not appear that program associate directors have given clear direction regarding the approach on civil rights issues to be taken in budget hearings. Rather, it appears that this decision was most often left with the branch chief and, in some instances, with the individual examiner. There were significant differences within the respective jurisdictions of program associate directors with regard to how civil rights issues were treated during budget hearings.

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[165] See *To Extend Federal Financial Assistance*, *supra* note 62, at 645-755.

[166] Purcell interview, *supra* note 146. When CRU was responsible for the budget examination of the Civil Rights Division of the Department of Justice, it perceived such information dissemination as an important part of its role. See note 99 *supra*.

[167] Purcell interview, *supra* note 146.

[168] The 1974 transfer from CRU of budget examination for the Civil Rights Division may have limited CRU's ability to perform such a role. See note 99 *supra*.

[169] The contract compliance program is discussed extensively in *To Eliminate Employment Discrimination*, *supra* note 107, at 230-399.

[170] Hanna *et al*. interview, *supra* note 146. The OFCCP budget examiner, as of February 1976, was Thomas K. Morgan. Mr. Morgan spent from 10-30 percent of his time on contract compliance matters. Telephone interview with Thomas K. Morgan, budget examiner, Human Resources Division, OMB, Jan. 19, 1976.

[171] Tryck, Warner, and Powers interviews; Adkins, *et al*. interview; Beversee and Fletcher interview; and Gilchrist interview; *supra* note 146. Significantly, however, the examiners for the agencies with the largest responsibilities, the Department of Defense and the General Services Administration, indicated that they did not know of the figures circulated by the OFCCP examiner. Sullivan interview; Fasano interview, *supra* note 146.

[172] Fasano interview, *supra* note 146; Adkins *et al*. interview, *supra* note 146.

[173] See, e.g., OFCCP, "Formal Evaluation of the Contract Compliance Program of the Department of Defense for Fiscal Year 1975" (undated).

[174] *Budget Examiner's Handbook*, *supra* note 104, at sec. 441. The *Handbook* also instructed examiners to advise agencies of the need to stay within budget ceilings and, where appropriate, to discuss the agency's program evaluation. *Id*. at sec. 443.

[175] The Transportation Branch of the Economics and Government Division followed this procedure in conducting hearings during the fall 1975 review. Adkins *et al*. interview, *supra* note 146.

[176] The fall 1975 hearings regarding the Department of the Treasury and the Veterans Administration followed these examples. Telephone interviews with budget examiners Eugene B. Tryck, Economics and Government Division, and Frederick F. Fletcher, Community and Veterans Affairs Division, Feb. 2, 1976.

[177] *Budget Examiners' Handbook*, *supra* note 104, at sec. 441.

At least 10 of the 33 civil rights programs covered by the examiners interviewed were not discussed at all during the budget review hearings,[178] despite the fact that various civil rights problems existed in these programs that could have been addressed. For example, the Title VI program of the Department of Agriculture's Extension Service was characterized by poor staffing and organization; inadequate racial, ethnic, and sex data; a weak model affirmative action plan; and failure to defer or terminate funding in cases of noncompliance with Title VI.[179] Similarly, the Veterans Administration's Loan Guaranty Service had only marginally enforced Title VIII. Its deficiencies included need for equal opportunity staff in field stations, failure to require participating brokers to sign the HUD-VA nondiscrimination certification, inadequate monitoring of the compliance certifications which VA does require, and lack of affirmative marketing regulations.[180] The Federal Communications Commission, as yet another illustration, had inadequately enforced its regulations prohibiting employment discrimination by licensees, primarily because the agency had too broadly defined job categories and had not considered the resolution of employment discrimination complaints a high priority in monitoring its regulations.[181]

The remaining 18 programs received varying degrees of attention. Most questioning on civil rights programs was general in nature, merely seeking the agency's views on resource requirements and descriptions of annual program objectives. There appeared to be no questioning directed at determining whether past appropriations had been effectively used and whether the agency could show any impact on discrimination as a result of these expenditures.

For example, HUD was questioned on eliminating its complaint backlog.[182] However, during the budget review process, no questions were directed to HUD officials on whether more effective use of resources would be achieved through pattern and practice reviews.[183] The Commission found in 1974 that HUD's fair housing program ". . .continues to be largely ad hoc, as it it based. . .chiefly on the investigation and resolution of complaints."[184] The Commission, therefore, concluded that HUD should redirect its resources allocated to fair housing enforcement to focus on communitywide pattern and practice reviews.[185]

The Department of Labor was questioned concerning a reorganization of the Office of Federal Contract Compliance Programs as well as training for compliance officers.[186] However, no attention was given to the need for OFCCP to develop strategies, such as removal of an agency's responsibilities, to encourage adherence by compliance agencies to OFCCP directives.[187]

Most of the questioning on civil rights issues during the hearings appeared to be relatively brief, superficial, and ad hoc. The branch responsible for examining transportation agencies, however, had been exemplary in the procedures it follows to carry out its civil rights responsibilities. Each year, approximately one month before the regular budget hearing, the Transportation Branch in the Economics and Government Division held a special civil rights hearing with each of the major offices and agencies within the Department of Transportation (DOT) having civil rights responsibilities.[188] Written questions were usually submitted 72 hours in advance of the hearing.[189] During the fall 1975 hearings, DOT agencies were questioned concerning their performance, problems, and objectives in their internal employment practices, as well as in contract compliance, Title VI, and minority enterprise[190] programs.[191]

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[178] Programs not discussed in the fall 1975 budget hearings were the following: Department of Agriculture enforcement of Exec. Order No. 11246 and Title VI, Warner and Grumbly interview, *supra* note 146; Department of the Treasury enforcement of Title VIII and Exec. Order No. 11246, 1976 Tryck interview, *supra* note 176; General Services Administration enforcement of Exec. Order No. 11246 and Exec. Order No. 11512, Fasano interview, *supra* note 146; Veterans Administration enforcement of Exec. Order No. 11246, Title VI, Title IX, Title VIII, Title IX, Title VIII, 1976 Fletcher telephone interview, *supra* note 176; and Federal Communications Commission enforcement of equal opportunity rules for broadcast licensees and common carriers, Fannon interview, *supra* note 146.

[179] See *To Extend Federal Financial Assistance, supra* note 62, at ch. 2.

[180] See *To Provide. . .For Fair Housing, supra* note 147, at ch. 3.

[181] See *To Regulate in the Public Interest, supra* note 147, at ch. 1.

[182] Gilchrist interview, *supra* note 146. HUD was also questioned on its own equal employment practices, its activities with other Federal agencies to promote fair housing goals, and the percentage of its assigned contractors subjected to contract compliance reviews in the previous year.

[183] *Id*. OMB stated:

> In this context, it is interesting to note that the Director of OMB wrote the Secretary of Housing and Urban Development on July 24, 1973, directing him to "consider alternative means for fulfilling the Department's fair housing and equal opportunity responsibilities, in addition to the current reactive complaint system." Oaxaca letter, *supra* note 22.

[184] *To Provide. . .For Fair Housing, supra* note 147, at 329.

[185] *Id*. at 348.

[186] Morgan telephone interview, *supra* note 170.

[187] Hanna *et al*. interview, *supra* note 146. OMB stated, "This is completely false. Methods for improving compliance by agencies were discussed at the hearing, including consolidation of enforcement responsibilities." Oaxaca letter, *supra* note 22.

This Commission notes that Mr. Morgan said that the issue was not covered in 1975 because "we did not consider it to be one of our highest priorities" and because it would cause "too much wrenching." This Commission does not have information to affirm or dispute OMB's contention that consolidation of compliance responsibility was discussed in 1975 and that the goal of the discussion was "improving compliance by agencies." We note, however, that the issue Mr. Morgan stated was not discussed was that of strategies for encouraging contract compliance agencies to improve their enforcement of Executive Order No. 11246 as amended, for example, the possible withdrawal of compliance responsibilities from an agency when there has been inadequate enforcement of the Executive order.

Several questions of the transportation examiners reflected keen insight into important civil rights issues. For example, the Office of the Secretary was asked to explain what action DOT was taking to stimulate the transportation regulatory agencies, such as the Civil Aeronautics Board or the Interstate Commerce Commission, to encourage equal employment opportunity among their regulatees.[192] The question was important because these transportation agencies had thus far declined to adopt equal employment rules governing their regulatees, despite strong evidence of widespread discrimination.[193]

Similar insight was shown in the Branch's questions concerning contract compliance. One of the major problems facing that program, Government-wide, had been the failure to identify the total number of contractors within an agency's jurisdiction.[194] The OMB examiner questioned the Department on its efforts to resolve this difficulty[195] and also asked for its views on proposals for centralizing the Government contract compliance program to improve its effectiveness.[196] Such a proposal was made by this Commission in 1975.[197]

Generally, the questions raised by the Transportation Branch about Title VI programs were brief and did not address issues of program effectiveness. For example, the Federal Aviation Administration was asked only how many Title VI reviews it had conducted in fiscal years 1974 and 1975, how many were projected for fiscal year 1976, and how many employee years were required for such reviews each year.[198]

By far the most thorough and sophisticated questioning pertained to internal equal employment matters.[199] Each DOT agency was questioned on such matters as its current employment of women and minorities, the number of openings in professional positions filled by minorities and women, the results of affirmative action recruitment efforts, and the progress in accomplishing affirmative action goals.[200]

Although some improvement could have been made in the questions raised by the Transportation Branch, it nevertheless appeared to be the only unit within OMB to have instituted a systematic approach to civil rights concerns during budget review hearings. It should be regarded by OMB as a model for other units. When asked why other OMB examining branches were not encouraged to follow the example of the Transportation Branch, the Deputy Associate Director having civil rights coordinating responsibilities indicated that each agency's programs were different from DOT's and that the adoption of an OMB-wide model made little sense.[201] The lack of a set procedure, however, in most cases, resulted in little or no attention being given to civil rights problems during budget review hearings.[202]

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[188] Adkins *et al*. interview, *supra* note 146. During the fall 1975 review, civil rights hearings were held on the programs within the Office of the Secretary, Federal Aviation Administration, National Highway Transportation Safety Administration, Urban Mass Transportation Administration, Federal Highway Administration, Coast Guard, and Federal Railroad Administration. *Id*.

[189] During the fall 1975 reviews, written questions were submitted in advance to all agencies except the Federal Highway Administration, which received a memorandum subsequent to the hearings confirming the topics covered.

[190] Questions concerned the section 8(a) program conducted by the Small Business Administration and Federal agency procurement offices to assist small businesses owned by economically disadvantaged persons. 15 U.S.C. §637(a) (1970). The section 8(a) program is discussed extensively in U.S. Commission on Civil Rights, *Minorities and Women As Government Contractors*, 35–62 (1975).

[191] Transportation Branch, Economics and Government Division, Office of Management and Budget, questions regarding "National Highway Transportation Safety Administration: Civil Rights Activities," Aug. 20, 1975; "Questions for the FAA Civil Rights Review," Sept. 26, 1975; "Questions for the FRA Civil Rights Review," Sept. 26, 1975; "Questions for the UMTA Civil Rights Review," Oct. 7, 1975; "Questions for the OST Civil Rights Hearing," Oct. 10, 1975; questions regarding "Coast Guard Civil Rights Activity" (undated); "Federal Highway Administration: Civil Rights Budget Review" (undated).

[192] "Questions for the OST Civil Rights Hearing," *supra* note 191.

[193] See *To Regulate in the Public Interest*, *supra* note 147, at 101–126.

[194] See *To Eliminate Employment Discrimination*, *supra* note 107 at 274–76.

[195] "Questions for the OST Civil Rights Hearing," *supra* note 191.

[196] *Id*. The question was as follows: Discussions are in progress to determine a way to improve the Federal contract compliance program, perhaps by means of centralization or other actions to enhance program effectiveness. Please identify options and discuss pros and cons for consideration, e.g., transfer of DOT responsibility to another agency in whole or in part (nonconstruction only, for example).

[197] *To Eliminate Employment Discrimination*, *supra* note 107, at 663.

[198] "Questions for the FAA Civil Rights Review," *supra* note 191. Similar questions were asked of the Urban Mass Transportation Administration. "Questions for the UMTA Civil Rights Review," *supra* note 191. The National Highway Transportation Safety Administration was asked to "provide background information on the problems and accomplishments of Title VI and Compliance activities for 1975 and 1976," and to indicate its plan for fiscal year 1977. "National Highway Transportation Safety Administration Civil Rights Activities," *supra* note 191.

[199] The Transportation Branch examiners indicated that great emphasis was placed on DOT's internal employment because its record in employing minorities and women was poor compared with the record of other departments. Adkins *et al*. interview, *supra* note 146.

[200] Familiarity of the OMB examiner with internal equal employment problems at DOT was reflected in a question submitted to the Federal Aviation Administration (FAA) regarding a selective preference program for hiring bilingual (Spanish/English) employees. The examiner asked FAA to explain the difficulty it had faced in obtaining Civil Service Commission approval for extending this program beyond stations near the Mexican border.

As noted previously,[203] OMB Director Lynn, immediately prior to the fall 1975 hearings, issued a special directive to examiners to scrutinize the impact of programs on women in their budget reviews. However, most budget examiners failed to cover important problems in agency programs relating to sex discrimination. For example, budget examiners for the Veterans Administration and the Department of Agriculture's Extension Service did not inquire about the failure of those agencies to issue regulations or establish programs for enforcement of Title IX, which prohibits sex discrimination in federally assisted educational programs.[204] The Department of the Interior was not questioned about its failure to enforce its sex discrimination regulations by investigating sex segregation in sports events held at park facilities funded by the Bureau of Outdoor Recreation.[205] Similarly, the examiner for HUD did not ask that Department why it had not adequately amended its fair housing regulations to include prohibitions against sex discrimination after the law was amended to include sex discrimination in 1974.[206] Likewise, the Federal Highway Administration (FHWA) was not asked why it had not issued regulations implementing section 162(a) of the Federal-Aid Highway Act of 1963[207] prohibiting sex discrimination in FHWA-assisted programs.[208]

In summary, there were a number of factors hindering adequate treatment of civil rights in budget review hearings. OMB did not collect civil rights information at the time it collected other information submitted pursuant to Circular No. A-11, nor did it ensure that budget examiners had and used information available from outside sources. Examining branches and divisions were not required regularly to contact the Civil Rights Unit. While there was some coordination among examiners on contract compliance programs, there was no similar system established concerning Title VI enforcement or agency fair housing responsibilities. Both of the latter programs, however, affected most major agencies. There was no requirement that budget examiners raise questions pertaining to civil rights programs or that the Civil Rights Unit participate in hearings. There was no mechanism for ensuring systematic scrutiny of the effectiveness of civil rights programs in accomplishing their purposes with the resources allocated. Some OMB staff believed that the lack of OMB emphasis on civil rights programs was inevitable because such programs did not involve large expenditures.[209] Other OMB staff disagreed and, in fact, attempted to give civil rights programs the careful analysis they so urgently needed.[210]

C. OMB Director's Review

Following the completion of budget review hearings, each examiner prepared an analysis comparing the agency's requests and the examiner's recommendations. The deputy associate director, after consulting other units within OMB, developed the division's recommendations,[211] which were subsequently discussed in the Director's Review when a determination is made on OMB's recommendation to the President regarding agency budget and staffing.[212] At this review, the examining division was expected to be prepared to justify the recommendation as well as to highlight all major policy issues and to discuss an agency's objectives, program evaluation, and performance in meeting past objectives.[213] Oral presentations were made in the Director's Review for larger agencies, and written presentations were used for the review of smaller agencies.[214] Oral review sessions usually focus on "significant program and dollar issues including crosscut presentations in selected program areas."[215] At this time, issue papers may be presented that objectively analyze major issues in terms of the budgetary and program impact of various alternatives.[216]

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[201] Derman interview, *supra* note 88.

[202] OMB noted that Mr. Derman "disagrees that the lack of a model has resulted in little attention given to civil rights concerns at hearings—witness the detailed questions posed to OFCC, EEOC, HEW-OCR, HUD Fair Housing, etc." Oaxaca letter, *supra* note 22.

[203] See note 57 *supra* and accompanying text.

[204] Bevensee and Fletcher interview and Grumbly interview, *supra* note 146. Title IX of the Education Amendments of 1972, *supra* note 142, requires all Federal agencies providing assistance to educational programs to ensure the absence of sex discrimination in those programs. The Veterans Administration's jurisdiction is over proprietary educational institutions. See *To Ensure Equal Educational Opportunity*, *supra* note 147. The Department of Agriculture's responsibilities under Title IX are discussed in *To Extend Federal Financial Assistance*, *supra* note 62, at 37–45.

[205] Powers interview, *supra* note 146. This deficiency in the Department of the Interior's program is discussed in *To Extend Federal Financial Assistance*, *supra* note 62, at 223–26.

[206] Gilchrist interview, *supra* note 146. The Housing and Community Development Act of 1974 amended Title VIII, to include a prohibition against sex discrimination. 42 U.S.C. §3601 *et seq.* (1970) (Supp. V, 1975). The examiner did, however, ascertain that HUD had not yet collected adequate data on the problem of sex discrimination in housing to identify what its priorities should be. See ch. 1, sec. VI(D) *infra* for a discussion of HUD regulations pertaining to sex discrimination.

[207] 23 U.S.C. §324 (Supp. V, 1975). See *To Extend Federal Financial Assistance*, *supra* note 62, at 468.

[208] Adkins *et al*. interview, *supra* note 146.

[209] Interview with Roger L. Greene, budget methods specialist, Budget Review Division, OMB, July 24, 1973.

[210] The Transportation Branch disagreed that the level of expenditure should determine the priority with which a program is treated. Adkins *et al*. interview, *supra* note 146.

[211] *Budget Examiners' Handbook*, *supra* note 104, at secs. 444–45.

[212] *Id*. at sec. 451.

[213] *Id*. at sec. 445.

Several examiners indicated they believe the issue paper to be a good mechanism for raising civil rights concerns.[217] Moreover, in the past, the Director's Review was used for consideration of civil rights issues cutting across agency lines of responsibility. For example, issues discussed in the fall 1972 hearings included the contract compliance program, Title VI enforcement, and the inclusion of equal opportunity responsibilities as part of a housing study being conducted by HUD.[218] One result of the review was an increase in the level of resources allocated to contract compliance activities.[219] Issues raised in the Director's Review of 1973 included racial and ethnic data collection,[220] coordination of Title VI enforcement, enforcement of the prohibition against discrimination in general revenue sharing,[221] Federal equal employment opportunity, and contract compliance.[222] Nevertheless, no civil rights Director's Reviews were held in 1974 or 1975,[223] which reflects the low priority OMB assigned to civil rights issues during those years.

D. Allowance Letters

After agencies were given an opportunity to appeal to the Director on the examining divisions' recommendations, the Director sent an "allowance letter" in January to each agency indicating the final budget to be submitted to the Congress and the Presidential goal to be accomplished in that budget. The January 1973 allowance letters from the Director of OMB to agency heads included, for the first time, separate figures for dollars and personnel to be allocated to civil rights activities.[224] This practice of setting spending floors for civil rights in the allowance letters conveyed a sense of priority. Although the practice was continued in January 1975, it was abandoned in 1976. Allowances letters issued in 1976 stated:

> For the past several years, this letter included policy guidance and in some cases allowances for certain Government-wide programs or activities of special interest to the President (i.e., statistical programs, civil rights activities, automatic data processing systems, and intergovernmental relations). While the President's interest in these matters continues, specific guidance and allowances are not presented in this letter, but will be provided informally, as appropriate, by OMB staff.[225]

Thus, as of January 1976 attention to civil rights concerns in the formal budget process and at higher levels within OMB appeared to have significantly diminished.

IV. PROGRAM EVALUATION AND MANAGEMENT

One of the major reasons for OMB's creation was to establish a mechanism for improving the management of the executive branch.[226] OMB was to develop information and management systems by which the performance of agencies and departments could be evaluated to determine whether they were achieving their intended objectives.[227]

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[214] *Id.* at sec. 451.

[215] *Id.*

[216] *Id.*

[217] Hanna *et al.* interview, *supra* note 146. Nonetheless, Commission staff interviews with budget examiners revealed that although a few issue papers had been developed on proposed civil rights regulations or legislation over the year, only one issue paper was developed during the budget review which pertained even indirectly to a civil rights problem. That paper involved the costs of validating tests used by the Civil Service Commission (CSC) which have been challenged as racially discriminatory. Lyle interview, *supra* note 146. practices, see *To Eliminate Employment Discrimination, supra* note 107, at 24–61.

[218] OMB response, *supra* note 42.

[219] *Id.*

[220] Racial and ethnic data collection is discussed in sec. V *infra*.

[221] For a discussion of this enforcement program, see *To Provide Fiscal Assistance, supra* note 147.

[222] 1974 Robinson interview, *supra* note 99.

[223] 1976 Robinson interview, *supra* note 87; O'Neill interview, *supra* note 79.

[224] For example, one allowance letter read:

> Within the employment and financing allowances established in this letter, are to provide full staffing for activities attributable to contract compliance, enforcement of Title VI of the Civil Rights Act of 1964, and equal employment opportunity within the Federal service. Specifically, it is expected that you will support civil rights activities in 1974 at a level of at least $1,227,000 in obligations and 68 full-time permanent positions. These amounts are included in the ceilings specified in this letter. Letter from Caspar W. Weinberger, Director, Office of Management and Budget, to Peter G. Peterson, Secretary of Commerce, Jan. 26, 1973.

[225] *Budget Examiners' Handbook, supra* note 104, at exhibit 479. OMB indicated that the civil rights provisions were removed from allowance letters in 1976, along with other similar provisions concerning such matters as data processing, because allowance letters had become too lengthy to be effective in communicating budget information to agency and department heads. O'Neill interview, *supra* note 79. Commission staff members were permitted to inspect very briefly examples of letters sent in 1975 and 1976 in order to attempt to evaluate OMB's justification for the omissions in 1976. The narrative of the 1975 letter shown to staff was approximately eight pages in length, while that of the 1976 letter was two pages.

[226] For a discussion of the establishment of OMB, see sec. I *supra*.

To carry out this responsibility, OMB developed in 1971 a Performance Management System (PMS) by which agency performance goals were set and results were measured quarterly.[228] PMS was applied to only three major programs with direct civil rights implications,[229] despite an instruction from the OMB Director that the system be used to ensure the achievement of civil rights goals.[230]

PMS was followed in 1973 by a system termed "Management by Objective" (MBO).[231] In his message to department and agency heads announcing the MBO system, President Nixon explained that:

> As an additional measure to help us ensure that we are continually running the machinery of government in the people's interest, I am now asking each department and agency head to seek a sharper focus on the *results* which the various activities under his or her direction are aimed at achieving.[232]

As a results-oriented evaluation tool, MBO had the potential to encourage assessments of the effectiveness of Government enforcement of civil rights laws as well as the extent to which the benefits of Government programs were reaching intended recipients, including minorities and women.

Under the MBO system as it evolved during 1973, 21 principal agencies and departments,[233] under the overall coordination of OMB, developed lists of objectives which they believed to be of priority interest to the President.[234] These lists of Presidential "objectives" were then reviewed by OMB staff[235] to ensure that they were in line with administration policy and the agency's enabling legislation. OMB staff also analyzed the objectives to ensure that they were realistic and of sufficient importance. OMB, after consultation with the White House staff, made suggestions for improvement, and even, in some cases, for adoption of objectives not proposed by the agencies.

The lists were then discussed and negotiated between OMB and the agencies. When in final form, they were submitted to the President for approval.[236] In order to measure progress toward these objectives, tracking systems were designed and progress reports were to be submitted to OMB for review by management analysts.[237] Periodic management conferences were to be held between OMB's Director or Deputy Director and agency heads to discuss progress.[238] As a result of these efforts, 144 Presidential objectives were selected for fiscal year 1974, 84 of which were continued during fiscal year 1975 along with at least 88 new goals.[239] Of the 172 Presidential objectives in effect during fiscal year 1975, only three, or 1.7 percent, pertained to the goal of eliminating both sex and racial/ethnic discrimination[240] and only three others were addressed to the rights of minority groups.[241]

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[227] President's Message, *supra* note 4. See also *1971 Enforcement Effort* report, *supra* note 3, at 330–31.

[228] This system was described briefly in *One Year Later* report, *supra* note 27, at 204–05 and *Reassessment* report, *supra* note 27, at 9.

[229] These programs were as follows: The Food and Nutrition Service of the Department of Agriculture, the Office of Minority Business Enterprise of the Department of Commerce, and the Equal Employment Opportunity Commission. *Reassessment* report, *supra* note 27, at 9.

[230] OMB Office Memorandum No. 71-53, *supra* note 30.

[231] For a series of articles on MBO, see 5 *National Journal Reports* 783, June 2, 1973; 1201, Aug. 18, 1973; 1703, Nov. 17, 1973; 6 *National Journal Reports* 609, Apr. 27, 1974; 921, June 22, 1974; 1597, Oct. 26, 1974; 7 *National Journal Reports* , 1071, 1077, July 26, 1975.

[232] Memorandam from Richard M. Nixon, President, to Department and Agency Heads, Apr. 18, 1973.

[233] The 21 MBO agencies were the 11 Cabinet departments (Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; the Interior; Justice; Labor; State; Transportation; and the Treasury) and ACTION, the Atomic Energy Commission, Central Intelligence Agency, Civil Service Commission, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Small Business Administration, and Veterans Administration. The Federal Energy Administration was added to the list of MBO agencies in 1974. 6 *National Journal Reports* 1597, Oct. 26, 1974.

[234] In addition, OMB encouraged the establishment of "Secretarial" objectives—second-priority goals, to be monitored by agency heads, and third-priority objectives for major divisions within agencies. OMB Circular No. A-11 (Revised) "Preparation and Submission of Budget Estimates," §24.3(b), June 1974.

[235] Management associates, in addition to having MBO responsibilities, conducted analyses of management systems and assisted in policy development. Their responsibilities, unlike those for budget examiners, were not described in any handbook. Basic instructions for management associates came from program associate directors. Interview with John Ostenso, Management Associate, Human and Community Affairs Management Division, OMB, Feb. 11, 1976. As of early 1976, management associates spent most of their time on projects other than MBO. For example, the associates in the Economics and Government Management Division during 1975 spent little or no time on MBO and focused on policy development concerning deregulation. Telephone interview with Diane K. Steed, Management Associate, Economics and Government Management Division, Feb. 6, 1976. Until 1975, all management associates were located in management divisions paralleling budget divisions and grouped with their respective budget divisions under the same program associate director. In 1975, one of the four management divisions—Natural Resources, Energy, and Science—was eliminated and its staff integrated into the related budget divisions. The remaining three management divisions—Economics and Government, Human and Community Affairs, and National Security and International Affairs—were maintained. For a discussion of OMB's basic organizational structure, see sec. II(A) *supra* .

[236] Presidential approval was secured in September 1973. 5 *National Journal Reports* 1703, Nov. 17, 1973.

[237] Telephone interview with James Fish, Management Associate, Management Division for National Security and International Affairs, OMB, Aug. 6, 1974.

[238] Ostenso interview, *supra* note 235. See also 6 *National Journal Reports* 609, 614–15, Apr. 27, 1974.

[239] 6 *National Journal Reports* 1597, 1604, Oct. 24, 1974.

[240] The three objectives directed at sex discrimination were also directed at race and ethnic discrimination; they were as follows: Civil Service Commission—improve its evaluations of agency equal employment pro-

Some agencies did not include among their Presidential objectives any civil rights goals, although appropriate objectives of a level of importance equal to one or more of those adopted were available for inclusion. The Department of Justice (DOJ), for example, adopted Presidential objectives for fiscal year 1975,[242] which included reducing the number of illegal aliens and providing assistance to State and local criminal justice systems. The Department's Presidential objectives did not include any goals addressed to its responsibility for coordinating enforcement of Title VI, although the lack of uniformity among Federal agencies in the implementation of Title VI has long been a major problem.[243] MBO might have been a management tool readily adaptable for enhancing DOJ's coordinative efforts.

Similarly, the Department of the Treasury adopted 15 Presidential objectives for fiscal year 1975 without including one goal pertaining to the civil rights responsibilities of the Department's Office of Revenue Sharing.[244] Presidential objectives selected by the Department included obtaining guidelines for identifying persons entitled to protection as Presidential candidates.[245]

One reason for the inadequate coverage of civil rights in the Presidential objectives may have been the lack of civil rights input at OMB. Only a few OMB staff members contacted the Civil Rights Unit with inquiries relating to proposed or possible civil rights objectives.[246] Although the Civil Rights Unit was subsequently provided a list of objectives for all of the agencies, this was not accompanied by any request for formal review of civil rights matters. A major flaw in the MBO approach was its heavy emphasis on the process of developing interim objectives without a concomitant emphasis on evaluating whether accomplishing these objectives would further the long-range goals.[247] For example, one civil rights objective of the Department of Labor (DOL) was to increase employment opportunity for minorities and women among Federal contractors and federally assisted contractors by improving the enforcement performance of compliance agencies having jurisdiction over these contractors.[248] To achieve this Presidential objective, DOL planned to develop and implement by July 1974 a system for setting standards for compliance agency performance and to monitor agency progress in requiring affirmative action.[249] As of July 1975, however, one year beyond the target date, the Department had just begun implementation.[250] More significantly, OMB did not follow up with management conferences[251] to determine whether such activities had caused any measurable results in terms of the overall objective of increasing equal employment opportunity.[252]

Similarly, the Department of Housing and Urban Development (HUD) set as a major goal for fiscal year 1976 to "achieve equal opportunity."[253] To carry out this objective, HUD's plans included

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grams; the National Aeronautics and Space Administration—increase female and minority employment; and the Department of Labor—improve monitoring of Federal agency enforcement of the contract compliance program. *Id*. The contract compliance program is described in *To Eliminate Employment Discrimination*, *supra* note 107.

[241] The three other Presidential objectives pertaining to the rights of minorities were as follows: Department of Housing and Urban Development—eliminate housing discrimination; Department of Commerce—promote minority ownership of business; and Department of Health, Education, and Welfare—redefine Federal role in financing elementary and secondary education in light of court orders requiring equal educational opportunity for bilingual, handicapped, and low-income students. 6 *National Journal Reports* 1602, 1604, Oct. 26, 1974.

[242] Department of Justice, Presidential Objectives: FY 1975, Submitted for Presidential Consideration, Nov. 15, 1974. The other six objectives were as follows: reducing the impact of organized crime; developing and implementing a Career Criminal Action Program; curtailing white collar crime; reducing the availibility of controlled substances; reducing demand on Federal judicial resources; and coordinating Federal-State investigative responsibility and efforts. *Id*.

[243] See *To Extend Federal Financial Assistance*, *supra* note 62, at 645–755.

[244] The civil rights program of the Office of Revenue Sharing is discussed in *To Provide Fiscal Assistance*, *supra* note 147.

[245] Department of the Treasury, "List of Treasury Objectives for Tracking at the OMB-Presidential Level: FY 1975," Mar. 17, 1975.

[246] 1974 Robinson interview, *supra* note 99.

[247] The OMB Deputy Director indicated that OMB recognized in summer of 1975 that the MBO "process" had perhaps received more attention than the substantive goals to be identified. O'Neill interview, *supra* note 79. As a result, a new approach was evolved. For a discussion of this point, see sec IV *infra*.

[248] For a full discussion of the contract compliance program, see *To Eliminate Employment Discrimination*, *supra* note 107, at 230–379.

[249] To make the system more effective, DOL planned to: (a) standardize compliance review procedures at a uniform high level of quality, (b) establish targets for increased utilization of minorities and women, (c) develop the capacity to audit affirmative action plans, (d) conduct compliance reviews, (e) maintain constant contact with all aspects of compliance agency activities, and (f) recommend possible modification in the compliance program for construction contractors.

[250] See *To Eliminate Employment Discrimination*, *supra* note 107, at 328–42.

[251] OMB had planned to schedule management conferences between agency heads and the OMB Director or Deputy Director to discuss agency progress in obtaining the management objectives.

[252] OMB encouraged the department to conduct studies on the impact of the contract compliance program. *To Eliminate Employment Discrimination*, *supra* note 107, at 288. However, OMB did not follow up this suggestion by reviewing the studies eventually completed by the department. In fact, as of February 1976, there had not been any management conference on the contract compliance program since the fall of 1974. Ostenso interview, *supra* note 235.

[253] Department of Housing and Urban Development, "Major Secretarial Objectives, Goals Management System: Quick Look Status As of 11/30/75" (undated).

reducing its backlog of Title VI and Title VIII complaints,[254] conducting 76 reviews of recipients' compliance with Title VI,[255] and obtaining 42 areawide affirmative marketing agreements.[256] However, the OMB management analyst whose area of responsibility included HUD could not recall what, if any, assessment had been conducted to determine whether these activities would, in fact, make any impact on the long-range goal of equal opportunity.[257] He was also not aware of the Commission's finding that HUD's emphasis on eliminating complaints may not be an effective approach for attacking discrimination.[258] This type of example indicated that OMB did not systematically evaluate MBO strategies—or require that agencies conduct such evaluations—to determine whether Government expenditures for programs were having their intended results.[259]

During 1974 and 1975, OMB attempted to integrate MBO into the budget review process.[260] Circular No. A-11 was revised to require agencies to submit budget proposals according to their major objectives.[261] The handbook for examiners was amended[262] to instruct examiners to prepare a presentation on management objectives during the Director's Review.[263] However, none of the budget examiners interviewed by the Commission's staff indicated any increase in emphasis on MBO in the budget review process after the revision.[264]

By March 1976, there were signs that OMB had abandoned MBO altogether.[265] Neither the Director nor Deputy Director had held a management conference with an agency since July 1975.[266] In contrast, for the 2-year period prior to that time, approximately 75-100 such conferences had been held.[267] Moreover, unlike the previous 2 fiscal years, for fiscal year 1976 the President did not request agencies to submit their proposed objectives.[268] Consequently, in some agencies, no objectives were developed.[269]

OMB's official position was that it had not abandoned MBO but had merely decided to focus more attention on "program evaluation."[270] In the summer of 1975, according to OMB's Deputy Director, OMB began a process of "marrying" the concepts of program evaluation and MBO.[271] As a result of this process,[272] in November 1976 OMB issued Circular No. A-113, "Preparation and Submission of Management Plans, General Information and Policies, General Requirements."[273] The circular "prescribes general guidance and responsibilities for the preparation, submission and execution of management plans by Federal agencies." One of the objectives of this management effort was:

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[254] HUD's handling of complaints pursuant to Title VI and Title VIII is discussed in *To Provide . . .For Fair Housing, supra* note 147, at 30-41 and 52-56.

[255] HUD's Title VI compliance reviews are discussed in *Id* . at 56-60.

[256] "Major Secretarial Objectives," *supra* note 253. Affirmative marketing agreements are discussed in *To Provide. . .For Fair Housing, supra* note 147, at 76-91.

[257] Ostenso interview, *supra* note 235.

[258] *To Provide. . .For Fair Housing, supra* note 147, at 329 and 348. An agency strategy dependant on complaints does not identify the extent and kinds of discrimination occurring, as some forms of discrimination may be unperceived by their victims. A low volume of complaints may indicate more about the public's lack of familiarity with procedures for filing complaints than about the extent of discrimination. It may also indicate reluctance to become involved in the complaint process or skepticism about the outcome. See A. Blumrosen, "Anti-discrimination Laws in Action in New Jersey: A Law-Sociology Study," 19 *Rutgers L. Rev.* 189 (1965) and Note, "The California Fair Employment Practice Commission: Stepchild of the State Agencies," 18 *Stan. L. Rev.* 197, 203 (1965).

[259] Likewise, the Civil Service Commission (CSC) included among its objectives the advancement of equal employment opportunity. CSC's proposal for achieving this goal was to have each agency implement upward mobility plans. However, since upward mobility plans are not directed specifically at minority groups or women, CSC implementation of this proposal was not necessarily going to impact on CSC's goal. For a discussion of this point, see *To Eliminate Employment Discrimination, supra* note 107, at 95-96 and 106.

[260] Ostenso interview, *supra* note 235.

[261] Circular No. A-11 (revised) June 28, 1974. See also sec. III *supra* .

[262] *Budget Examiners' Handbook, supra* note 104, at secs. 451 and 458-464.

[263] The Director's Review is discussed in sec. III (c) *supra* .

[264] These interviews are listed in note 146 *supra* .

[265] Speculation that OMB had abandoned MBO began much earlier. See, e.g., 7 *National Journal Reports* 1071, July 26, 1975; and R. Samuelson, "Power on the Potomac: The People Everyone Loves to Hate," *Washingtonian Magazine* 62 (November 1975).

[266] O'Neill interview, *supra* note 79.

[267] *Id* .

[268] Telephone interview with John Ostenso, Management Associate, Human and Community Affairs Management Division, OMB, Mar. 8, 1976.

[269] As of March 1976, the agencies and departments without fiscal year 1976 Presidential objectives included the following: the Departments of Health, Education, and Welfare; Commerce; the Interior; the Treasury; and the Veterans Administration. Telephone interviews with Robert Sermier, Office of Management Planning and Technology, Department of Health, Education, and Welfare, Mar. 5, 1976; James T. Caprio, Office of the Assistant Secretary for Administration, Department of Commerce, Feb. 27, 1976; James Kelly, Director, Office of Management Services, Department of Interior, Mar. 11, 1976; Frank G. Wolf, former Chief, Planning and Evaluation, Office of Management and Organization, Department of the Treasury, Mar. 8, 1976; and Derman interview, *supra* note 88.

[270] O'Neill interview, *supra* note 79. See also, 7 *National Journal Reports* 1071, July 26, 1975.

[271] *Id* . As noted in sec. I, *supra* , Federal law requires OMB to administer regulations directing agencies to conduct evaluations of their operations' efficiency. 5 U.S.C. §305 (1970). OMB stated:

> The Commission obviously shares the view of OMB and the President that program evaluation is a critical area for more agency focus in producing improved Federal management and program performance. This concern was clearly highlighted by the President this summer when he launched his Presidential Management Initiatives (PMI) Program which established a massive management improvement effort in the 20 major agencies in government. This activity has been superseded by the issuance of OMB Circular A-113 which was signed into effect in December and which, like PMI, has program evaluation planning and implementation as a vital element. Oaxaca letter, *supra* note 22.

[272] The process of developing program evaluation guidelines was coordinated by the Evaluation and Program Implementation Division within OMB. *Id* . However, management associates periodically commented on draft proposals. Ostenso interview, *supra* note 268.

[273] OMB Circular No. A-113, Nov. 17, 1976.

> . . . to assure that the policies and programs that an agency is charged with administering are analyzed on a periodic basis to determine (i) the extent to which they have achieved and can be expected to achieve their objectives, (ii) the costs thereof on outlays, burdens imposed and negative effects with respect to other objectives or goals, and (iii) whether modification or elimination of any policies or programs (with or without alternative approaches) is necessary or desirable. . . .[274]

Agencies were also directed to describe the principles that they applied to determine which programs should be reviewed periodically under the circular. The circular did not specifically require agencies to evaluate their civil rights enforcement programs. However, once such a program was selected for review, the review included a determination of whether the program has met its objectives. Thus, it would appear that the agency would be required to attempt to measure the impact of the program in eliminating discrimination.

OMB had earlier included in a draft circular entitled "Evaluation of Federal Programs,"[275] which was superseded by the issuance of Circular A-113, a provision that would require agencies to assess each program it selected for review to determine whether it "properly complies with applicable laws," which would presumably include Title VI of the 1964 Civil Rights Act. The adoption of this criterion in the circular could have been a significant first step in encouraging agencies to evaluate the impact of their programs on minorities and women.[276] OMB stated:

> The assertion that "adoption of this criterion in the circular could have been a significant first step in encouraging agencies to evaluate their programs' impacts on minorities and women" is an unsupported conclusion. There is no automatic connection between determination of statutory compliance and measurement of impact.[277]

This Commission disagrees. The impact upon minorities and women of a federally assisted program which is operated by all recipients in compliance with applicable civil rights law is far superior to the impact of a program which is not so operated.

In January 1976, this criterion was eliminated from "Evaluation of Federal Programs." It was not repeated in Circular A-113. OMB noted:

> [T]he criterion for evaluations originally contained in paragraph 4b(3) of the November 19, 1975 draft was deleted, after review and comment by agencies, from the version subsequently forwarded to the Director for approval and signature. . . .
>
> [T]here is general agreement among the professional evaluation community that [this criterion] is more appropriately an audit function—not evaluation.[278]

OMB also stated that:

> [T]he inclusion of provisions to highlight certain interest areas, (e.g., civil rights, energy conservation, environmental preservation, etc.) in a general evaluation policy circular might be misconstrued as a dictate from OMB that certain types of evaluations, or certain program areas, were to receive priority attention at the expense of other programs or interest areas.[279]

In light of the infrequency with which agencies have selected civil rights programs for management focus in the past, explicit guidance from OMB requiring civil rights assessments appears to be urgently needed.

V. STATISTICAL POLICY

A. Racial/Ethnic and Sex Data Collection

The need for racial and ethnic data, cross-tabulated by sex, on beneficiaries of Federal programs has been well documented.[280] Federal agencies must have this information to ensure that minority groups and women are not being unlawfully denied their fair share of Government benefits. Such data, however, were generally not available. Where they were, they had often been collected by an unscientific and unreliable methodology.[281]

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[274] *Id.*

[275] Memorandum from Fernando Oaxaca, Associate Director for Management and Operations, OMB, "Draft OMB Circular on Evaluation of Federal Programs" to Heads of Executive Departments and Establishments, Nov. 19, 1975. OMB stated, "[T]he purpose of the draft circular was to provide general guidance and responsibilities for the establishment and maintenance of evaluation systems in all executive departments and agencies." Oaxaca letter, *supra* note

[276] Although Title VI does not cover sex discrimination, a series of enactments have in effect extended Title VI protections to women. For a brief description of these enactments, see note 162 *supra*.

[277] Oaxaca letter, *supra* note 22.

[278] *Id.*

[279] *Id.*

[280] *To Provide Federal Financial Assistance, supra* note 62. U.S. Commission on Civil Rights, *To Know or Not to Know, The Collection and Use of Racial and Ethnic Data in Federal Assistance Programs* (1973) [hereinafter referred to as *To Know or Not to Know*]; Interagency Racial Data Committee, *Establishing a Federal Racial/Ethnic Data System* (1972) and *The Racial Data Policies and Capabilities of the Federal Government* (1971); I.L. Murphy, *Public Policy on the Status of Women* 84 (1973), and N. Seifer, *Absent from the Majority: Working Class Women in America* (National Project on Ethnic Americans of the American Jewish Committee (1973)). See also, the Urban

OMB is the one Federal agency with authority to remedy these deficiencies on a Government-wide basis. It is responsible for assessing the informational needs of Federal agencies and for coordinating the collection of information.[282] Moreover, as President Nixon stated in establishing OMB,[283] one of the major purposes of the office was to ensure that Federal programs reach the intended beneficiaries. If OMB is to meet that objective, it must make certain that Federal assistance reaches minorities and women on an equitable basis. However, as of 1976 it had not issued a directive to Federal agencies requiring them to collect data in a standardized form to make such a determination.

In 1971 Director Shultz, acknowledging that OMB's function was handicapped by the paucity of civil rights data, instructed the staff to conduct a review and develop a program for improving the collection of such information.[284] In response to his directive, OMB established a six-member working group to consider the issuance of Federal guidelines for data collection.[285] The overall task assigned to this group was to make a detailed study of the Federal Government's need for racial and ethnic data.[286] The group undertook two efforts: (1) to make recommendations for the standardization of racial and ethnic data collection; and (2) to determine if the submission of racial and ethnic data in Federal agency budgets would aid in assessing the impact of Federal programs on racial and ethnic minorities.[287]

1. Standardization of Racial/Ethnic and Sex Data

Shortly after its formation, the OMB working group solicited comments from agencies and minority group organizations on a proposed revision of the OMB circular setting standards for Federal statistics, Circular A–46.[288] The circular did not set mandatory standards for racial, ethnic, and sex data but merely established, in exhibit F to the circular,[289] permissible racial designations, which themselves were inadequate. The only mandatory provision in exhibit F was a prohibition of the use of the term "nonwhite."[290] In 1974 the circular was revised, but no changes were made in exhibit F on racial and ethnic data.

The chief deficiency in exhibit F was its failure to delineate standardized classifications for reporting on ethnic and racial minority groups, cross-classified by sex.[291] The circular permitted the grouping of ethnic minority groups with majority groups "when the most summary distinction between the majority and minority races is appropriate."[292] The circular did not define or give examples to explain such cases. As a result, Federal data on whites sometimes included data on persons of Spanish origin and sometimes did not.[293] The circular also permitted the grouping of national origin and racial minority groups so long as the description of the data clearly indicated that both classifications were included. No restrictions were placed on such grouping despite the widely recognized problems created by classifying together minority groups such as blacks and persons of Spanish origin.[294] The circular also failed to provide any standardized terminology for ethnic or racial minority groups other than blacks. The circular did not, for example, give guidance as to whether the term Hispanic, Spanish-speaking, Spanish surname, Spanish American, Spanish origin, or Spanish-speaking background was preferable. In the absence of such guidance, Federal agencies continued to use a variety of identifiers, often collecting

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Institute and International City Management Association, *Measuring the Effectiveness of Basic Municipal Services–Initial Report* 7, 8 (February 1974).

[281] *To Know or Not to Know, supra* note 280.

[282] 44 U.S.C. §3503 (1970).

[283] See note 4 *supra*.

[284] OMB Memorandum No. 71–53, *supra* note 30.

[285] *Id*.

[286] Members included representatives of the Civil Rights Unit and several OMB divisions including the Statistical Policy and Management Systems Divisions.

[287] See letter from Frank C. Carlucci, Associate Director, OMB to Margaret A. Cotter and Morton H. Sklar, Cochairmen, Interagency Racial Data Committee, June 7, 1972.

[288] OMB Circular No. A–46 (March 28, 1952).

[289] Other exhibits to the circular include standards for sampling surveys, data processing, publication of statistics, measurement of poverty, and release of economic indicators. *Id*.

[290] Circular No. A–46 Revised (May 3, 1974) at Exhibit F, Item 1. As of March 1976, this was still the only mandatory provision in Exhibit F, which was Exhibit K prior to the May 3, 1974, revision.

[291] Commission criticisms concerning Circular No. A–46 were forwarded to OMB in a memorandum from Jeffrey M. Miller, Chief, Federal Evaluation Division, U.S. Commission on Civil Rights, "Request for Recommendations Concerning the Revision of Circular A–46" (undated) and letter from Jeffrey M. Miller to Roye L. Lowry, Clearance Officer, Statistical Policy Division, OMB, Feb. 29, 1972.

[292] OMB Circular No. A–46, *supra* note 288.

[293] See *To Know or Not to Know, supra* note 280, at 33–34. See also, letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to the Honorable Patricia Schroeder, Chairwoman, Subcommittee on Census and Population, Committee on Post Office and Civil Service, U.S. House of Representatives, Oct. 7, 1975.

[294] The necessity of reporting data separately for racial and ethnic groups has been discussed in a number of sources cited in note 280 *supra*.

data that were not comparable with other agencies and therefore of limited utility.[295]

The Commission on Civil Rights has recommended that agencies be required, as a minimum, to include in their general data collection systems the categories of American Indian, Asian American, Black, Spanish origin, and other, cross-classified by sex. The OMB working group considered the expansion of the circular to at least five groups: Negro/Black, Asian American, American Indian, Spanish descent, and all other.[296] These groups, as a minimum, were listed on many forms used by the Federal Government to collect information on race and ethnic origin, but the terms used to designate these groups varied widely.[297] Such standardization of terminology would improve the utility of much Federal data. The proposal to standardize racial and ethnic data lay dormant for several years.[298] However, after considering the matter for more than a year, OMB stated that it had "rejected" the idea of standardization.[299] OMB indicated that it was "too difficult" to obtain agreement among those who had commented on the proposed revisions as to what terminology should be used.[300] It was as if OMB believed that the effort saved by not attempting to resolve this problem, i.e., reconciling different views, justified the tremendous burden to society imposed by collecting unstandardized data which are of limited use.[301]

In the absence of standardization, Federal agencies had to act independently. Two years following OMB's rejection of standardized categories, the Equal Employment Opportunity Commission (EEOC) and the Department of Health, Education, and Welfare (HEW) jointly developed racial and ethnic classifications to be used in an employment reporting format, the Form EEO-6, for institutions of higher education.[302] As of late 1975, EEOC and HEW planned to request a field test of the EEO-6 categories by the Bureau of the Census and, after making any necessary refinements, recommend to OMB that they be issued as the standard for all Federal statistics on race and national origin.[303] OMB indicated that:

> It is anticipated that these [EEO-6] common definitions and categories when fully implemented will meet the needs expressed by both the Executive Branch and the Congress for compatible and nonduplicative racial and ethnic data.[304]

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[295] See *To Know or Not to Know*, *supra* note 280, at 31-32.

[296] *Id*. at 88. The Commission further recommended that separate data on Mexican Americans, Puerto Ricans, Chinese, and Japanese be collected "unless a valid reason for failing to do so can be demonstrated" and that data on such groups as American Indian Tribes, Portuguese, and French Canadians be shown whenever data collecting occurs in locales with significant numbers of these disadvantaged groups. *Id*. See also, testimony of Louis Nunez, Deputy Staff Director, U.S. Commission on Civil Rights, before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service, June 11, 1974.

[297] The Equal Employment Opportunity Commission and the Civil Service Commission use these categories for the collection of employment information. The Department of Housing and Urban Development uses these categories in its racial and ethnic data collection programs. The Loan Guarantee Service of the Veterans Administration uses these categories in gathering data for applicants and approved applications for direct and guaranteed home loans. The Department of Health, Education, and Welfare uses these categories in compiling information regarding public school enrollment. For a discussion of the types of data collected by various agencies, see *To Ensure Equal Educational Opportunity*, *supra* note 147, at 25-32, 168, 173-74; *To Eliminate Employment Discrimination*, *supra* note 107, at 182-83, 366-69, 476, 487-88; and *To Provide Federal Financial Assistance*, *supra* note 62, at 52-56, 190-97, 252-58, 332-44, 435-38, 509-10, and 629-30.

[298] As of February 1976, the OMB Deputy Director did not know why an amendment had not been issued. O'Neill interview, *supra* note 79.

[299] Attachment to letter from Frank C. Carlucci, Associate Director, OMB, to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Aug. 3, 1972.

[300] Interview with Milo Sunderhauf, Analytical Statistician, Statistical Policy Division, OMB, July 27, 1972. See also, OMB response, *supra* note 42.

[301] OMB objected to this criticism. The Associate Director for Management and Operations wrote to this Commission, "It is one thing to criticize OMB for not reaching conclusions desired by the Commission, but it is totally unreasonable to assert that OMB has not attempted to reach a conclusion after documenting [a long litany of OMB] efforts." Oaxaca letter, *supra* note 22.

This Commission believes its criticism is fair. Although lack of standardization was a problem for both the Government and the public, in 1972 OMB had made a decision not to resolve that problem. As noted, it wrote to this Commission that it "rejected" standardization and informed Commission staff that this rejection was because it was "too difficult" to reconcile opposing views.

[302] Form EEO-6 was published for comment in May 1974, 39 *Fed. Reg*. 16157 (1974), and finalized in June 1975, 40 *Fed. Reg*. 25190 (1975). The racial/ethnic categories, which are broken out by sex, adopted in the employment format are as follows: (1) American Indian or Alaskan Native: a person having origins in any of the original peoples of North America; (2) Asian or Pacific Islander: a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands; (3) Black/Negro: a person having origins in any of the black racial groups of Africa; (4) Caucasian/White: a person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent; and (5) Hispanic: a person of Mexican, Puerto Rican, Cuban, Central, or South American, or other Spanish culture or origin, regardless of race. In data collection forms developed previously by the EEOC, the following classifications were used: American Indian, Oriental (or Asian American), Negro, White, and Spanish Surnamed American. See forms EEO-1, EEO-2, EEO-3, and EEO-4, CCH Employment Practices, @1877 to @1889. The form EEO-5, applicable to elementary and secondary schools, follows the classifications adopted in form EEO-6. CCH Employment Practices Dec. ¶ 1891.

[303] OMB, "Current Developments," 16 Statistical Reports 51 (September 1975).

[304] *Id*.

As of February 1976, OMB had informally indicated to all agencies that the EEO-6 categories were acceptable[305] and during the form clearance process had encouraged agencies to adopt the categories.[306] In August 1976, OMB joined these two agencies; the Departments of Housing and Urban Development, Labor, and Justice; and the General Accounting Office to adopt substantially similar categories.[307] In October 1976, OMB again proposed a revised attachment to Circular No. A-46 which would require that all Federal agencies use the standardized categories which had been adopted by the seven agencies.[308] This proposed standardization would be an important step in improving Federal statistics.[309] As of early January 1977, however, the revision remained in proposed form and had not been finally adopted by OMB.

2. Using Statistical Data for Determining Program Impact on Minorities and Women

The working group established following the 1971 directive by Mr. Shultz also considered the issuance of an OMB requirement that agencies submit racial and ethnic data to OMB. As a result of the group's recommendations, on September 1, 1972, OMB issued Bulletin No. 73-3, "Impact of Federal Domestic Assistance Programs on Selected Racial and Ethnic Groups,"[310] which was a single exploratory attempt at collection of racial and ethnic data. Data on the sex of beneficiaries were not sought. The bulletin was addressed to all Federal agency heads, and its scope was extended to all programs listed in the Catalog of Federal Domestic Assistance[311] which had fiscal year 1972 obligations of over $40 million. The bulletin carefully limited its requirement to available program data and estimates for which a reasonably valid basis existed. Thus, no new data collection efforts were to be instituted to compile a reply to the bulletin's request. The bulletin's instructions sought indications of the number and percentage by racial and ethnic group of those eligible for each program, those applying for program benefits, those who were actual beneficiaries of the program, and those adversely affected.[312] A narrative statement covering certain matters was also requested.[313]

Ultimately, as a result of extensive followup by OMB, responses were received for 97 percent of the approximately 250 programs covered by the bulletin. Most replies were either "not appropriate" or "unavailable."[314] The information provided was generally of a poor quality and unusable. The responses from each agency were distributed to the budget examiner assigned to that agency, but OMB undertook no general followup to determine why such poor responses were received.[315]

The issue of an OMB racial/ethnic data collection requirement lay dormant until June 1973 when Deputy Director Malek met with the Leadership Conference on Civil Rights.[316] Apparently as a result of that meeting, OMB established a task force to conduct a second study of racial/ethnic data collection and use. The study, which was to be carried out during late 1973 and early 1974, was essentially a management review of seven Federal programs[317] to determine whether and how racial, ethnic, and sex data should be used in program management and budget formulation. For each program and with varying degrees of completeness, OMB determined how racial, ethnic, and sex data could be used to show whether program benefits were being equitably distributed and whether civil rights laws were being upheld.

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[305] *Id.*

[306] Interview with Fernando Oaxaca, Associate Director for Management and Operations, OMB, Jan. 27, 1976.

[307] Memorandum from George E. Hall, Chief, Social Statistics, Statistical Policy Division, OMB, to the Ad Hoc Committee on Race/Ethnic Categories, Aug. 20, 1976.

[308] OMB Racial and Ethnic Standards for Federal Statistics and Administrative Reporting, Draft: Attachment F, Circular No. A-46, Revised, Oct. 10, 1976.

[309] Staff of this Commission strongly supported the proposed revision. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to George E. Hall, Chief, Social Statistics, Statistical Policy Division, OMB, Dec. 19, 1976.

[310] OMB Bulletin No. 73-3, "Impact of Federal Domestic Assistance Programs on Selected Racial and Ethnic Groups," Sept. 1, 1972. The selected groups were given as "Negro/Black, Spanish American, Asian American, American Indian, and Other." Initially, OMB Circular No. A-11, which sets forth requirements for Federal agency budget submissions, was under consideration as a vehicle for such data collection. This circular is issued annually with few changes. OMB preferred, however, to issue the request for data as a bulletin, which carries less authority and would generally not be repeated. Circular No. A-11 does, however, request submission of data on the beneficiaries of civil rights programs. See Circular No. A-11 *supra* note 33, at Exhibit 53-A. While this information is collected, it is not published in the *Special Analysis on Civil Rights Activities* along with other information requested to Circular No. A-11 because the quality of data on beneficiaries is believed by the CRU staff to be inferior. Telephone interview with James B. Robinson, Budget Examiner, Community and Veterans Affairs Division, OMB, Jan. 27, 1976.

[311] OMB, Catalog of Federal Domestic Assistance (1972).

[312] "Those adversely affected" meant those upon whom a program had a negative impact other than a mere determination of ineligibility or nonparticipation. The instruction gave as an example of such negative impact the physical relocation of families occasioned by a federally assisted program. OMB Bulletin 73-3, *supra* note 310.

[313] This included a description of the program delivery mechanism, an analysis of program impact on racial and ethnic groups, and comments concerning the reliability of the data.

[314] Interview with James B. Robinson, budget examiner, Civil Rights Unit, CVAD, OMB, July 26, 1973.

[315] OMB response, *supra* note 42. Some of the problems were nevertheless, apparent. OMB officials noted, for example, that the bulletin went to budget representatives and not civil rights staff. Interview with Howard Borgstrom and Oliver Taylor, Management Associates, Program Implementation and Coordination Division, OMB, Aug. 7, 1973. Other problems may have been the lack of any advance notice by OMB of an intent to require such data and the failure to suggest in a timely manner any existing agency collection systems as models. These are among problems suggested by the Center for National Policy Review, Catholic University of America. Letter from Morton H. Sklar, Revenue Sharing Project Director, Center for National Policy Review, to John Ostenso, Management Associate, Community and Veterans Affairs Division, OMB, Oct. 26, 1973.

[316] See note 78 *supra* for a discussion of this meeting.

The study again found a severe lack of data and concluded that there was a need for a Government-wide uniform requirement on racial, ethnic, and sex data collection. For the second time, an OMB committee recommended that OMB institute a Government-wide requirement for the collection and use of data on the race, ethnic origin, and sex of eligibles for and beneficiaries of federally assisted programs. Each agency would be required to submit a plan to OMB indicating how it would collect and use these data.[318] In the summer of 1974, almost 3 years after OMB had initiated this study on the problem of racial/ethnic data collection, the task force was asked to conduct further analysis, including inquiring into matters, such as cost, which had already been considered by the working group in 1972.[319] In any event, the cost of such data collection should not be insurmountable. The Federal Government already spends over $500 million annually for the collection and analysis of data[320] on a wide variety of topics, including cattle location records and truck weight studies.[321] In many cases, data on race, ethnic origin, and sex could be collected by the expansion of existing systems.[322]

In 1974, OMB's Statistical Policy Division (SPD) was reorganized to establish a branch devoted to developing an interagency effort on statistical planning. Seven major objectives were selected by SPD, one of which was entitled "Statistical Measures of Discrimination."[323] The Deputy Associate Director for Statistical Policy, Joseph W. Duncan, reported that OMB would attempt to develop measures for determining the progress made in overcoming discrimination.[324] In a followup report almost a year later, no mention was made of any steps taken toward the objective.[325]

Moreover, no progress was made on the racial/ethnic data collection project, which again became inactive only to be revived by another contact from the Leadership Conference on Civil Rights. In May 1975, Deputy Director O'Neill met with the Conference and committed himself to giving, within 30 days, a definitive OMB position on the Conference's proposals for Government-wide collection of racial/ethnic and sex data.[326] He also indicated that OMB would issue guidelines unless there were "overwhelming" reasons not to do so,[327] and he assigned the task of coordinating the effort to OMB Associate Director Fernando Oaxaca.[328] Throughout the summer and fall of 1975, OMB staff debated the issue internally.[329] The Civil Rights Unit prepared a proposal which resulted in a counterproposal by the Statistical Policy Division.

In December 1975, Mr. Oaxaca met with representatives of the Leadership Conference[330] and discussed a draft circular which OMB had proposed which would require agencies to submit data to OMB on the racial and ethnic composition of Federal program eligibles, applicants, and beneficiaries.[331] The draft proposal contained a number of deficiencies.[332] It did not require data by sex despite Director Lynn's previous instruction that OMB staff begin to analyze the impact of Federal programs on women.[333] Moreover, the draft would have permitted agencies to report estimates rather than actual head count data[334] and to use unverified techniques for sampling data on which to base estimates.[335] Another deficiency in the draft was its failure to require that data show the types and levels of assistance received by the beneficiaries of a program.[336]

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[317] These programs were as follows: Department of Agriculture— National School Lunch Program, and Farmers Home Administration; Veterans Administration—Loan Guarantee Service; Department of Labor—Employment Service; Department of Health, Education, and Welfare—Social and Rehabilitation Service, Trio (Talent Search, Upward Bound, and Special Service to Disadvantaged Students), and Health Manpower Student Loans and Scholarships. These programs were selected for many reasons. OMB attempted to choose programs of a variety of sizes, with varying degrees of sophistication in data collection, representing Title VI, loan, and direct assistance programs. 1974 Currie interview, *supra* note 105.

[318] *Id*.

[319] OMB's deliberations on this issue are discussed briefly in the *Reassessment* report, *supra* note 27, at 25.

[320] *Budget of the United States Government, Fiscal Year 1977— Special Analysis*, at 140.

[321] Subcomm. on Consumer Statistics of the House Committee on Post Office and Civil Service, 1969 Report of Statistical Activities of the Federal Government (1970).

[322] See *To Know or Not to Know*, supra note 280, at 26.

[323] J. Duncan, "Developing Better Long Range Plans for Federal Statistics," 75 *Statistical Reporter* 49, 53 (1974).

[324] *Id*.

[325] R. Raynsford, "The Interagency Statistical Planning Effort, 1975," 76 *Statistical Reporter* 45, 50 (1975).

[326] Oaxaca interview, *supra* note 306; Derman interview, *supra* note 88; this meeting is discussed in sec. II *supra*. See also, Flemming letter *supra* note 293.

[327] Oaxaca interview, *supra* note 306; Derman interview, *supra* note 88.

[328] Oaxaca interview, *supra* note 306.

[329] 1976 Robinson interview, *supra* note 87; Derman interview, *supra* note 88; and interview with Roye Lowery, Clearance Officer, Statistical Policy Division, OMB, Jan. 23, 2976.

[330] The Associate Director for Management and Operations reported:

> I have. . .met. . .only with some staff members of the Conference and I indicated at the time that. . .I would like to deal with members with black faces, brown faces and women rather than white males in order to explore in detail the issue of mandatory or self-identification of individuals in all Federal paperwork or computer files referring to their participation in any capacity in Federal programs or employment. Oaxaca letter, *supra* note 22.

[331] 1975 Flemming letter *supra* note 77; and Oaxaca interview, *supra* note 306. Mr. Oaxaca emphasized that this draft proposal had not been subject to OMB internal review procedures and the proposal represented only the "first initial thinking" on the question. *Id*. See also, letter from Paul R.

On the other hand, the draft contained a number of provisions which, if implemented, would significantly advance OMB's ability to carry out its responsibility for ensuring that people are not excluded from federally assisted programs because of their race, ethnic origin, or sex. The draft proposal would, for example, require agencies to submit a report to OMB showing the actual or estimated racial and ethnic composition of eligibles, applicants, and beneficiaries of major Federal assistance programs. The proposal would also require a determination of whether minority groups are being denied full opportunity to participate in the programs and, if not, a report on the steps taken to ensure such opportunity in the future.[337]

As of February 1975, 5 years after the project began, OMB appeared to have reached another impasse. The "insurmountable" reason for the failure to issue guidelines, according to OMB,[338] revolved around the question whether actual data would be required in the place of agency estimates. The former would require applicants and beneficiaries, in most cases, to identify their race, ethnicity, or sex. Mr. Oaxaca, the OMB "ombudsman" on the problem, expressed serious concern in late January 1976 that the minority community would object to collection of data on race or ethnicity based on self-identification.[339] Indeed, racial and ethnic data collection has been strongly endorsed not only by this Commission[340] but also by numerous civil rights organizations, including the Leadership Conference on Civil Rights.[341] There was also concern expressed by OMB that not all of the data suggested by the Leadership Conference would be useful to the agencies or OMB.[342] However, no survey of the potential utility of such data had been undertaken by budget examiners responsible for review of agencies with Title VI programs[343] or the Department of Justice which is responsible for coordinating Title VI enforcement.[344] OMB also expressed concern that the data collection proposal might involve burdensome costs.[345] Although cost considerations had been explored in both 1972 and 1974, staff was instructed in 1976 to contact agencies informally to obtain cost estimates.[346] Thus, instead of publishing the proposal for agency and public comment on such matters as costs and usefulness, OMB again relied on its internal review mechanisms which had produced little more than a stalemate in the past.

In response to this section, OMB wrote to this Commission:

> *Federal Data Collection and Statistical Policy* One of the more controversial areas discussed in the report is that of data collection by the Federal

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Diamond, director, Lawyers' Committee for Civil Rights Under Law, to Fernando Oaxaca, Associate Director, Management and Operations, OMB, Dec. 16, 1975.

[332] Some of these deficiencies were discussed in a letter from Morton H. Sklar, revenue sharing project director, Center for National Policy Review, to Fernando Oaxaca, Associate Director, Management and Operations, OMB, Dec. 12, 1975.

[333] See sec. I(B), *supra*.

[334] The weaknesses of relying on estimates for assessing minority involvement in programs were noted in *To Know or Not to Know*, *supra* note 280, at 44.

[335] Sklar letter, *supra* note 332.

[336] Failure of data to give such information can mask discrimination. For example, women and minorities may be equitably represented among beneficiaries of a job training program but discriminatorily excluded within the program from training for jobs with more earning potential.

[337] OMB, draft proposed circular on "Improved Management of Federal Domestic Assistance Programs (Civil Rights)" (undated).

[338] Derman interview, *supra* note 88.

[339] Oaxaca interview, *supra* note 306.

[340] *To Know or Not To Know*, *supra* note 280, at 88–89.

[341] See Sklar letter *supra* note 332. See also *To Know or Not To Know*, *supra* note 280, at 5–6. OMB stated:

> [C]ommitments of these organizations and their constituency to support mandatory individual identification of participants in Federal programs on all documents or files are not available to this office. Such documented positions would be very useful to OMB and the Department of Justice in formulating for policy-maker review the practical regulations that would permit some further progress in collecting the type of data which the Commission feels is so essential. Oaxaca letter, *supra* note 22.

The minority group organizations whose views on racial and ethnic data were examined in *To Know or Not to Know* included Americans for Indian Opportunity, Aspira of America, the Japanese American Citizens League, the Mexican American Legal Defense and Educational Fund, the National Association for the Advancement of Colored People, the National Congress of American Indians, and the National Urban League. In addition, the views of many individuals, including minority Federal employees and scholars, are reported in *To Know or Not To Know*. While their views varied on such issues as whether data should appropriately be gathered on application forms and whether self-identification should be used, these groups were all supportive of the use of racial and ethnic data as a civil rights compliance tool.

[342] O'Neill interview, *supra* note 79.

[343] For a brief discussion of the examiners' views on the need for racial, ethnic, and sex data, see Section III *supra*.

[344] *Id.* and 1976 Robinson interview, *supra* note 87.

[345] O'Neill interview, *supra* note 79.

[346] *Id.*

> government and its utility for Civil Rights enforcement. This area is complicated by the diversity of views of civil rights advocates (many of whom are not "minorities" themselves) regarding the appropriateness of program beneficiaries to be identified (or to self-identify) by race, ethnicity, sex, etc. in all documentation involving them and the further complications of the Privacy Act now in being. Aside from the issue of the hundreds of millions of dollars it might take annually to satisfy the "needs" that the Commission refers to are some more fundamental issues.
>
> Who should be the arbiter to determine whether existing statistics are adequate to serve society's "need to know" about the current situation of the racial, ethnic, sex, and age groups of which it is composed? The question is basically unanswerable because there is no common agreement *as to what the society needs to know.* The Commission quite clearly believes the existing supply of data to be hopelessly inadequate. To rectify that situation to bring it more into an area of acceptability to the Commission would not only require substantial additional resources but would impose a substantial additional reporting burden on the public. The Commission nowhere in its report faces up to this problem but seeks to dance around it, to infer that appropriate data could be had if only it were not for the mindless intransigence of OMB, and to rhetorically assert that the benefits to be achieved would exceed any cost.
>
> In criticizing OMB for its failure to develop adequate statistics, the Commission starts with the premise that all administrators are potential law breakers and that only by monitoring each of them continually on a 100 percent basis can it be determined that they are not law breakers. One can accept the first part of the premise without accepting the latter, just as one can accept the premise that all husbands are potential wife beaters without accepting as a necessary part of that premise that their behavior must be continually monitored on a 100 percent basis to prove that they are not.
>
> The fact is that no collection of statistics will *prove* violations of the law, and the indiscriminate proliferation of data will be a monstrously expensive and ineffective way to provide a means for monitoring compliance with the civil rights laws just as they would be for any other law.
>
> The Commission criticizes OMB for not proceeding with its effort to develop a statistical measure of discrimination. The criticism is justified, but the Commission may wish to ask *itself* whether it has not been negligent in failing to pursue some research in this area itself.
>
> The truth is that *nowhere* in the government have we undertaken the research necessary to develop a statistical measure of discrimination. Consequently, we see only continuous bickering about how much data we have or ought to have, with accusations of bad faith, dereliction of duty, etc., substituting for rational discussion. It is very dispiriting and serves no purpose except to relieve frustration temporarily.
>
> I believe OMB should be very interested in supporting an effort *initiated* by a working coalition of the Commission, the EEOC, OCR in HEW and OFFCP in Labor *at least to set the stage* for such a determination of criteria. A consensus from these investigatory and enforcement agencies would be a critical first step which OMB and the program implementation agencies in the Federal government could then follow up.[347]

This Commission is sympathetic to the difficulties which OMB faced in attempting to resolve such issues as diversity of views of civil rights advocates, complications of the Privacy Act, costs of collecting beneficiary data, and the burden on the public which could ensue. It does seem to us, however, that OMB might have perceived the obstacles to creating a system of information on beneficiaries of Federal programs to be larger than we viewed them to be.

For example, OMB's estimate that it might take "hundreds of millions of dollars" to collect the data necessary seems too high. To put that estimate in perspective, we note that $200 million dollars—the minimum amount of money which could be referred to as "hundreds of millions of dollars"—is more than one-third the amount of money the Federal Government estimated it would spend in 1977 for all its statistical programs and more than twice the amount it projected that it would spend that year for the statistical programs of the Bureau of the Census, Department of Commerce, which included planning for the 1980 census and collecting and publishing data on governments, economics, agriculture, and population. Similarly, OMB referred to "complications of the Privacy Act," but that act restricts the storage of information on individuals rather than placing any restriction on maintaining aggregate data. While a data system would need to begin with the identification of the race or ethnic origin and sex of beneficiaries, Federal storage of the data may not need to include individual identities.[348]

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[347] Oaxaca letter, *supra* note 22.

This Commission does not perceive that it has been "negligent" with regard to research on civil rights data collection. On the contrary, data collection has been the subject of frequent Commission investigation. In 1973, this Commission published *To Know or Not To Know—Collection and Use of Racial and Ethnic Data in Federal Assistance Programs* which evaluated the extent to which minorities[349] receive the benefits of Federal domestic assistance programs. It reports the views of many minority rights organizations on such issues as racial and ethnic data collection, self-identification, and inquiries about race and ethnic origin in conjunction with applications. It describes the parameters for creating a system for collecting and analyzing the data necessary to determine if Federal assistance is being distributed equitably. Further, in each of the six volumes of its study on *The Federal Civil Rights Enforcement Effort—1974*, the Commission reported on the data collection systems of individual Federal agencies.

OMB suggested that further study of the issue by an interagency group is in order, but at this point in time we disagree.[350] This Commission has studied the issue and so has OMB. Moreover, in both 1971 and 1972, officials from a number of Federal agencies, including the Departments of Labor and Health, Education, and Welfare, reviewed the need for racial and ethnic data, recommending that such data be collected and analyzed in federally assisted programs.[351] After each study, OMB has found barriers to implementing the recommendations. We are not optimistic that yet another study would break the stalemate which ensued. Since as of December 1976 OMB appeared still to have reservations about the net gain to be made by collecting data on race, ethnic origin, and sex of beneficiaries, perhaps a worthwhile compromise for the immediate future would be for OMB to publish its draft proposal for Federal agency and public comment.

B. Social Indicators

In 1973, the Statistical Policy Division of OMB completed *Social Indicators, 1973*, a statistical analysis of the progress toward widely held social objectives.[352] These objectives, which included good health, long life, freedom from crime, and the opportunity to work at a satisfactory job, were ones which OMB identified as being of concern to national policymakers.[353] Thus, the potential utility of this document was great, particularly to the executive branch and the Congress.[354] In order to evaluate advancement toward these objectives, *Social Indicators* relied on vast numbers of indices. For example, to measure progress toward increasing the life span of Americans, OMB used data from 1900 to 1970 on life expectancy, death rates, and leading causes of death.

Social Indicators generally displayed data for men and women separately and for blacks and whites separately.[355] The data generally were not cross-tabulated, which resulted in obscuring the status of minority women. Moreover, the analysis failed to include separate information on Asian Americans, Native Americans, or persons of Spanish origin,[356] although the quality of American life differs greatly for these groups.[357] For example, *Social Indicators*

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[348] See *To Know or Not to Know*, *supra* note 280, at 54 and 55.

[349] When this report was written, the Commission did not have jurisdiction over sex discrimination.

[350] OMB has suggested three agencies to work with this Commission on such a project: the Office of Federal Contract Compliance Programs of the Department of Labor, the Equal Employment Opportunity Commission, and the Office for Civil Rights of the Department of Health, Education, and Welfare. Even if we concurred that the establishment of an interagency committee would be helpful at this time, we would not recommend that all three of these agencies would be the most appropriate for the task. Both the Office of Contract Compliance Programs and the Equal Employment Opportunity Commission have as their principal responsibility the securing of equal employment opportunity. Only the Department of Health, Education, and Welfare has, as a significant component of its duties, the protection of rights of minorities and women who are beneficiaries of federally assisted programs.

[351] See reports of the Interagency Racial Data Committee, *supra* note 280.

[352] OMB *Social Indicators*, 1973.

[353] Interview with Paul Krueger, Deputy Chief, Robert B. Pearl, Assistant Chief, Social Statistics Branch, and Milo Sunderhauf, analytical statistician, Statistical Policy Division, OMB, Sept. 20, 1973.

[354] For example, at the Conference on Racial and Ethnic Data sponsored by the Institute of the Study of Educational Policy of Howard University, the Director of the National Institute of Education, Harold Hodgkinson, stated that he relied on *Social Indicators* more than any other reference work Feb. 6, 1976.

[355] Tables were presented in at least three ways, with data given separately for "White" and "Negro and other races"; "White and other races" and "Negro"; and "White" and "Negro."

[356] Asian Americans and Native Americans were apparently classified in this document as "other races." Persons of Spanish origin were apparently classified as white. The report contained no definitions of the racial categories used, but since the source of much of the data was the Bureau of Census, the categories were presumably the same as those used by the Bureau.

[357] OMB has been criticized for this omission by the National Council of La Raza:

> The factual condition of this nation's information systems is such that in making national policies, only black and white interests are defined statistically. To the extent that national policies are so defined, the

revealed that at birth the life expectancy of whites in 1970 was 71.7 years,[358] but it failed to report that the life expectancy for Native Americans was 64.9 years.[359] The need for separate data on a variety of racial and ethnic groups has been reported time and again.[360]

OMB staff stated in late 1973 that the principal reason for not including data on a wider variety of racial/ethnic groups was the lack of statistical information on persons of Spanish origin until the 1970 census.[361] There were, however, data for the years 1950 and 1960 available for Puerto Ricans and for persons of Spanish surname residing in the Southwest.[362] Moreover, many of the social indicators displayed data only for years as recent as 1970, for which data on persons of Spanish origin were available.[363] Further, data on Asian Americans and Native Americans were available for 1940, 1950, and 1960 and could have been used in *Social Indicators* . Admittedly, in many cases data on persons of Spanish origin, Asian Americans, and Native Americans were not as comprehensive as those on blacks and whites. Nonetheless, if OMB had included in *Social Indicators* some of the limited data available, the publication would have provided valuable points for comparison.[364]

In December 1976, OMB responded to this evaluation by stating:

> The Commission report criticizes *Social Indicators* for not having separate indicators for each race/ethnic group cross tabulated by sex. Unfortunately, the Commission failed to inquire properly into the matter and did not consider that much of the data is drawn from small sample surveys which frequently do not provide reliable data for distributions by race, ethnic background, and sex. *Social Indicators* takes such information as is available from time series of existing statistics. It has many deficiencies because the existing data themselves are frequently quite limited. The Commission's proper target is the content of existing statistical programs, not *Social Indicators* .[365]

This Commission agrees that as of 1973, when *Social Indicators* was published, data from Federal agencies such as the Departments of Health, Education, and Welfare and Labor and the Bureau of the Census of the Department of Commerce on nonblack minority groups were generally inadequate. We are fully aware that OMB was reliant on such other agencies for the data used in *Social Indicators* . As OMB stated, most of the data in that volume came from time series—several different years of collecting the same data. We are also aware that where data on nonblack minorities were available, the data were not generally available for the full range of years for which data on blacks and whites were available.

For some variables reported in *Social Indicators* , however, we found that there were data available on nonblack minorities for 1 or 2 years. This finding was

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existing management of public affairs can only reflect these interests and not those of Hispanic or other Americans.

The best example of the problem is to be found in the Office of Management and Budget itself. The OMB, we note, has developed a set of social indicators upon which the needs of this country are to be assessed. It is precisely this kind of information which is used for purposes of legislation and allocation.

Yet its report, Social Indicators 1973, has no reference to the Hispanic Americans of this country. We can only assume that the Hispanic Americans will not be an identifiable group which will receive the benefit of future social planning and resources. Alex Zermeno, acting national director, National Council of La Raza, testimony before subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service, June 12, 1974.

[358] *Social Indicators* , *supra* note 352, at 27.

[359] Unpublished data of the Indian Health Service. Telephone Interview with Gaile Maller, Chief, Population Statistics, Office of Program Statistics, Indian Health Service, Health Service Administration, HEW, Aug. 15, 1974.

[360] In general, see *To Know or Not To Know*, *supra* note 280. More specifically, the great scarcity of statistics on Native Americans is reviewed by S.A. Langone, "A Statistical Profile of the Indian—The Lack of Numbers," in *Toward Economic Development for Native American Communities* , a compendium of papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee. 91st Cong. 1st. Sess., 1969. The lack of data and studies to illustrate Asian American problems was critized by Japanese American Citizen's League, "A Brief for a Cabinet Committee for Asian American Affairs," Nov. 15, 1971. The lack of data on persons of Spanish origin was the subject of hearings held by the Subcomm. on Census and Statistics of the House Post Office and Civil Service Comm. (Hearings on House J. Res. 406, May 28, June 11, and 12, 1974). A joint resolution was passed in the House on Oct. 29, 1975, calling for Government-wide collection of data on Americans of Spanish origin. As of February 1975, the resolution was awaiting action in the Senate. 94th Cong., 1st Sess., H.J. Res. 92. See also U.S. Commission on Civil Rights, *Counting the Forgotten: the 1970 Census Count of Persons of Spanish Speaking Background in the United States* (1974).

[361] Krueger interview, *supra* note 353. OMB also pointed out that data on persons of Spanish speaking background from the 1970 census had not been published at the time the *Social Indicators* project began. A draft of this document was being prepared concomitantly with the Bureau of the Census publication of data on persons of Spanish origin.

[362] This region includes Arizona, California, Colorado, New Mexico, and Texas.

[363] For example, Table 4/21 gave median earnings by occupation, sex, and race for 1971 only. *Social Indicators* , *supra* note 352, at 147. Table 6/7 gave data on households living in substandard units, *Id* . at 208.

[364] For example, Table 4/2, showed unemployment rates for Negro and other races and whites for every year from 1948 to 1972. *Id* . at 113. Data could have been computed for 1950, 1960, and 1970 from the Census of Population for Native Americans and Asian Americans. Data on persons of Spanish surname residing in the Southwest could have been calculated for 1950 and 1960 from the census of population. Data on persons of Spanish speaking background could also have been calculated for 1969, 1970, 1971, and 1972 from data published by the Bureau of the Census.

[365] Oaxaca letter, *supra* note 22.

based on an extensive search of census and other Federal publications.[366] We believe that the inclusion of these limited data would have been useful in order to convey to the readers of *Social Indicators* something about the conditions of life facing a variety of minority groups. Moreover, even if OMB had, for each chapter, presented only one table with data on nonblack minorities which summarized the best data available for these groups for major variables,[367] this would have been a useful addition to *Social Indicators*. Such a table, accompanied by an explanation of the absence of data on nonblack minorities in the other tables, might well encourage the collection of more data in the future on nonblack minorities.

In late 1974, OMB established an advisory committee to provide suggestions on the development of a biennial report, to begin in 1976, on *Social Indicators* as well as on the construction of an entire system of social indicators.[368] The advisory committee met twice during 1975 to advise OMB on the content of *Social Indicators* , 1976.[369] Unfortunately, the format adopted for the 1976 analysis[370] suffered from most of the deficiencies contained in the 1973 version.[371]

OMB indicated that the 1976 analysis would contain data by race "where such detail is available, although the bulk of the time series will necessarily be limited to total and Negro and other races,"[372] with some increase in data by sex.[373]

Under Public Law 94–311,[374] OMB is required to develop a Government-wide program for collection, analysis, and publication of data concerning persons of Spanish origin. This law was designed to increase and improve the data available throughout the Government on persons of Spanish origin. If properly implemented, one result would be improved data for future editions of *Social Indicators* . As of late September 1976, OMB had done little to further the purposes of the law. It had held one meeting of key agencies that collect and publish data,[375] but this meeting was not held until 3 months had elapsed after the law was passed.[376] OMB directed the agencies involved to submit to OMB by late October 1976 long and short term goals for publication of data on persons of Spanish origin.

VI. LEGISLATIVE REVIEW

OMB's Legislative Reference Division (LRD) was the gatepost between Congress and the executive branch. LRD cleared all draft legislative proposals, comments, and testimony transmitted by Federal agencies and departments to the Congress. The Division also collected agency views on enrolled bills, that is, legislation awaiting Presidential signature or veto. LRD was ultimately responsible for determining whether the civil rights implications of proposed and pending legislation have been taken into account in the course of legislative review.[377]

When a proposal arrived at OMB from an agency, or when an enrolled bill was transmitted by the Congress, it was first submitted to the appropriate branch within LRD[378] that determined which agencies and OMB budget examiners should be asked to provide comment. Once LRD ensured that opportunity for comment was provided to all OMB units and Federal agencies having an interest in the proposal, the Division synthesized the commentary and gave advice to the proponent of the legislation or, in the case of enrolled bills, to the White House.[379]

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[366] For example, in ch. 5, entitled "Income," the following tables contained data for the categories of "white" and "Negro" or "White" and "Negro/other": 5/2, Median Family Income, by Race of Family Head: 1947–1971; 5/4, Median Family Income, by Sex and Race of Family Head: 1971; 5/5, Median Family Income, by Age and Race of Family Head: 4-year Average, 1968–1971; 5/6, Median Family Income, by Education, Age, and Race of Family Head: 4-year Average, 1968–1971; 5/7, Median Family Income, by Number of Earners and Race of Family Head: 1971; 5/11, Family Income, by Race, Sex, and Age of Family Head: 1971; 5/19, Persons Below the Low-Income Level, by Race: 1959–1971; 5/21, Persons Below the Low-Income Level, by Region and Race: 1959–1971; 5/22, Persons Below the Low-Income Level, by Race and Sex of Family Head: 1959–1971; 5/23, Profile of the Low-Income Population: 1971, by Race and by Age and Race. For Hispanics, some data were available but not used for Tables: 5/2—1959, 1969, 1970; 5/4—1970; 5/5—1969, 1970; 5/6—1971; 5/11 - 1971; 5/18 - 1969, 1970; 5/21 - 1969; 5/22, 1969, 1970; 5/23—1969; 5/24—1969, 1970. Similarly, there were some data available which could have been used in conjunction with these tables for 1959, 1960, and 1969 for Native Americans and for 1959, 1969, and 1970 for Asian Americans.

[367] For example, a table for the "Income" chapter might have addressed median family income and persons below the low-income level without covering such additional variables as age, education, or region.

[368] OMB "Current Developments," 75 *Statistical Reports* 129–30 (February 1975); and telephone interview with Denis F. Johnston, Director, Social Indicators Project, Statistical Policy Division, OMB, Jan. 16, 1976. At its formation, the advisory committee consisted of 21 members, 19 of whom were nonminority males. There was one nonminority female and one black male. In the summer of 1975 a male of Spanish origin was added to the committee. *Id* .

[369] Johnston interview, *supra* note 368.

[370] Memorandum from Denis F. Johnston, Director, Social Indicators Project, Statistical Policy Division, OMB, to the Advisory Committee on Social Indicators, Sept. 24, 1975.

[371] Telephone interview with Robert Hill, member, OMB Advisory Committee on Social Indicators, Research Department, National Urban League (Jan. 26, 1976).

[372] Johnston memorandum, *supra* note 370.

[373] Telephone interview with Denis F. Johnston, Director, Social Indicators Project, SPD, Sept. 28, 1976.

[374] H.J. Res. 92, Americans of Spanish Origin—Statistics, Pub. L. No. 94-311, 90 Stat. 688, §3 (June 16, 1976).

[375] These agencies were the Departments of Agriculture; Commerce; Health, Education, and Welfare; and Labor.

[376] One weakness of Public Law 94–311 is that it places no specific time restraints on OMB or any other Federal agency.

[377] OMB Office Memorandum No. 74–12, *supra* note 50.

[378] There are three branches within the Legislative Reference Division: Resources-Defense-International; Business-General Government; and Labor-Welfare-Personnel.

Procedures and guidelines governing agencies' responsibilities in seeking clearance, which have remained fundamentally unchanged since 1939,[380] are set out in OMB Circular No. A-19.[381] It requires that all bills which agencies wish to transmit to Congress be submitted first to OMB along with an analysis of the proposal, giving an estimate of the projected cost, a comparison with existing law, an indication whether other agencies have an interest in the proposal, and an assessment of the impact of the proposal, "where significant,"[382] on State and local governments. Circular No. A-19 also directs agencies to consider laws pertaining to cost analysis,[383] environmental impact,[384] and civil rights.[385]

Circular No. A-19 requires agencies to include "to the maximum extent possible" in their reports "appropriate recommendations, statements, or provisions to give effect to. . ."[386] civil rights laws barring discrimination on the basis of race, sex, national origin, or religion.[387] Other than listing examples of civil rights laws to be considered,[388] no other instructions were provided. OMB commented:

> Circular A-19 is not intended to be the source of all guidance to agencies or OMB staff on review of legislation. The process itself is designed, by referral to all interested agencies and OMB staff of a particular legislative item, to elicit analysis and comment on all relevant matters presented by it. Depending on the nature and scope of the legislative item, this could include a wide variety of matters—financial, organizational, management, administrative, legal, programmatic, intergovernmental relations, environmental impact, economic impact, civil rights, and a host of other policy or technical considerations. Clearly, guidance on all those matters could not conceivably be included in A-19. The fact that the Circular deals specifically with civil rights is an indication of the importance placed on that area of public policy, not of its neglect.[389]

The lack of guidance in Circular A-19 on civil rights was particularly significant since the agency administrative offices which receive legislation for comment from OMB often lacked expertise in this area. OMB did not, for example, suggest that agencies circulate proposed legislation to their civil rights offices or to civil rights groups to obtain assistance in drafting their comments.[390]

An additional instruction, Circular A-107,[391] was issued in January 1975, implementing Executive Order No. 11821[392] which requires agencies to certify, in their submissions to OMB, that they have evaluated the inflationary impact of any proposed "major" legislation.[393] As a result, the Legislative Reference Division routinely screened all agency proposals to determine whether their potential economic impact was significant.[394] This procedure was followed regardless of whether the agency has identified any potential economic impact of the bill.

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[379] OMB, *Legislative Coordination and Clearance Functions: Handbook of Descriptive Information and Detailed Instructions for OMB Staff Use* (September 1975).

[380] OMB, *The Legislative Clearance Function* (May 28, 1975). See also, R. Neustadt, "The Growth of Central Clearance," *Amer. Pol. Sci. R.* (1954).

[381] OMB Circular No. A-19 (Revised), *supra* note 17.

[382] *Id.* at sec. 7(c).

[383] 5 U.S.C. §2953 (1970) requires that any Executive agency proposal projected to cost more than $1 million and expanding the functions, activity, or authority of the agency must set forth specific information concerning estimated personnel and appropriation requirements.

[384] 42 U.S.C. §4332 (1970) requires agencies to prepare assessments of the impact of agency actions on the quality of the environment.

[385] Section 7(d) of Circular No. A-19 states as follows:

> Laws, Executive Orders, and other relevant directives in the civil rights area shall receive full consideration. These include Title VI of the Civil Rights Act of 1964. . providing for equal access to and benefits from programs receiving Federal financial assistance; Titles VIII and IX of Public Law 90-284. . providing for equal opportunity in housing; section 2(8) of Public Law 85-536. . .providing the basis for channeling Federal agency procurement to minority businesses; the [Executive orders] relating to equal employment opportunity in the Federal Service and in private employment by Federal contractors; and the [Executive order] on planning, acquisition, and management of Federal space. . . .[citations omitted].

[386] *Id.* This language also governs the instruction with regard to certain cost analysis and environmental impact determination.

[387] See note 385 *supra*.

[388] OMB Circular No. A-19 (Revised), *supra* note 17.

[389] Oaxaca letter, *supra* note 22.

[390] The Legislative Reference Division planned no change in Circular No. A-19 as of January 1976. Interview with James Frey, Assistant Director for Legislative Reference, OMB, Jan. 22, 1976. OMB commented:

> [T]he statements that "agency administrative offices which receive legislation for comment from OMB often lack expertise in this area" and that "OMB does not. . .suggest that agencies circulate proposed legislation to their civil rights offices" are. . .misleading as to the nature of the clearance process. In each agency we have a legislative liaison contact. Usually that routine point of contact is in the general counsel's office. One of the key functions of the legislative liaison is to assure that all parts of the agency which have an interest in or contribution to make on a legislative item have an opportunity to do so. This is analogous to LRD's job of assuring the same opportunity to concerned agencies and OMB staff. Oaxaca letter, *supra* note 22.

It is our opinion that Federal agencies often share OMB's view that "most legislation does not involve civil rights concerns." Too frequently agency civil rights offices are not asked to comment upon the impact upon minorities and women of proposed substantive legislation. For example, a staff member in the Office of Equal Opportunity, Department of Agriculture, stated that his office was never asked to comment upon proposed legislation for Department of Agriculture programs. Further, some civil rights offices have not been consulted when civil rights legislation has been circulated. For example, OMB recently sought comments from Federal agencies on proposed legislation to prohibit sex discrimination in federally assisted programs. The civil rights offices at the Urban Mass Transportation Administration and the Law Enforcement Assistance Administration were not given an opportunity to comment on the proposed legislation by the administrative offices in their agencies which reviewed the legislation.

[391] Circular No. A-107 (January 28, 1975).

[392] 3A C.F.R. §203 (Supp. 1975). This Executive order also requires agencies to certify that they have assessed the inflationary impact of proposed rules and regulations. The assessment itself is referred to OMB in the case of proposed legislation, and to the Council on Wage and Price Stability in the case of proposed rules and regulations. Frey interview, *supra* note 390.

A similar type of systematic screening was not conducted with regard to the civil rights impact of proposed legislation.[395] The Division indicated that most legislative proposals and reports were not accompanied by a statement on whether they were in conformance with civil rights laws.[396] Where such commentary was lacking, OMB did not send back the proposal or report for further review. The Legislative Division interpreted the civil rights instruction in Circular A-19, as well as its own scope of civil rights activity, to be limited to consideration of statutory provisions which distinguish on the basis of race, sex, national origin, or religion.[397] The Division did not screen proposed legislation to determine whether it would more adversely affect women or minorities than nonminority males.[398] Nor were examiners directed to include this perspective in their analysis of legislation when they were asked to review proposals.[399]

OMB responded to this criticism by stating:

> Most legislative proposals and reports are not accompanied by a statement on whether they are in conformance with civil rights laws simply because most legislative items do not involve civil rights concerns. . . .[A] legislative item (other than one dealing specifically with civil rights—e.g., extension of the Voting Rights Act) rarely presents an apparent civil rights issue. For example, legislation to raise the limit on SBA's direct loan program presents the basic issue of the appropriate size of the program. What may present a civil rights issue is SBA's *administration* of the program. At the same time, legislation in the social welfare field, because it is generally directed at lower income people, *is* analyzed for its impact on the populations to be served.[400]

It is our view that a vast amount of proposed legislation involves civil rights concerns. As early as 1967, this Commission noted the importance of building into the clearance process a mechanism for ensuring that a broader range of legislative proposals be viewed from a civil rights perspective.[401] Specifically, the Commission requested that it be asked to comment on administration bills likely to have civil rights implications, such as bills affecting cities and metropolitan areas,[402] disadvantaged persons and families,[403] and specific minority groups. When asked why such types of legislation were not routinely referred to the Commission, the Assistant Director of OMB for Legislative Reference said that the Commission would be "swamped" by the number of administration bills falling into these categories, which he viewed as "too broad."[404] He suggested that the Commission provide OMB with a more specific description of the types of bills it believes have civil rights implications.[405] It is this Commission's view, however, that all such legislation should be routinely referred, leaving the decision to the Commission, on each bill individually, as to whether the civil rights implications of that bill warrant comment and whether the Commission possesses the relevant expertise to advise OMB on that bill.

VII. OMB CIRCULAR NO. A-95

Circular No. A-95, first promulgated in 1969 by the Bureau of the Budget and most recently revised by OMB in January 1976,[406] provides a vehicle for coordinating Federal and federally assisted programs and projects with State, regional, and local plans and programs. OMB is responsible for policy oversight of the circular and for assisting Federal departments and agencies to develop regulations and procedures for implementing A-95 requirements.[407]

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[393] Exec. Order No. 11821, 3A C.F.R. §203 (Supp. 1975).

[394] Frey interview, *supra* note 390.

[395] The head of of the Division indicated that he did not believe a comparison could be made between the treatment of economic and civil rights issues by the Division since, in his judgment, economic impact is "generic" and civil rights impact is not. *Id*.

[396] Interview with Wilfred H. Rommel, Assistant Director for Legislative Reference, OMB, July 31, 1973; and Frey interview, *supra* note 390. The Legislative Reference Division was not able to indicate how many proposed bills contained a statement on civil rights.

[397] Frey interview, *supra* note 390.

[398] *Id*.

[399] *Legislative Coordination and Clearance Functions*, *supra* note 380.

[400] Oaxaca letter, *supra* note 22.

[401] Memorandum from William L. Taylor, Staff Director, U.S. Commission on Civil Rights, to Wilfred H. Rommel, Assistant Director for Legislative Reference, Bureau of the Budget (Jan. 25, 1967).

[402] "Included in this category," the Commission memorandum indicated, "would be bills involving housing, community facilities, transportation, urban planning, and community development." *Id*.

[403] Since minority groups form a disproportionate share of the disadvantaged, the memorandum noted, bills attempting "to aid the disadvantaged frequently have a direct bearing on achieving the goal of equal opportunity." *Id*. Examples of such bills included those "relating to the poverty problem, welfare programs, education, medical assistance, and job training." *Id*.

[404] Frey interview, *supra* note 390.

[405] *Id*.

[406] OMB Circular No. A-95 (Revised), "Evaluation, Review and Coordination of Federal and Federally-assisted Programs and Projects," Jan. 13, 1976, effective Feb. 27, 1976. The circular relies for statutory authority upon a variety of laws including the Demonstration Cities and Metropolitan Development Act of 1966, as amended, 42 U.S.C. 3301 *et seq*., §3333(c) (1970), and the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §4201 *et seq*., §4233 (1970). The 1966 act provides in part that applications submitted to Federal agencies for assistance for a variety of public facilities and projects, such as highways and hospitals in metropolitan areas, must be accompanied by comments of an areawide comprehensive planning agency

At the time of this Commission's review we found that Part I[408] set forth a system frequently referred to as the "A-95 process,"[409] which requires prospective applicants for any of approximately 200 Federal programs[410] to notify established State and areawide planning and development "clearinghouses"[411] of their intent to apply for Federal assistance. Such notices of intent were to include a brief description of the project.

Clearinghouses were then given 30 days to determine whether they are interested in reviewing the project application.[412] A clearinghouse might inform agencies affected by the proposed project of the opportunity to comment upon it. If a clearinghouse failed to state its interest within 30 days or if it responded that it was not interested, the prospective applicant might submit the application to the appropriate Federal agency. If, however, the clearinghouse decided that it wished to review the completed application proposal with the applicant, the application was to be completed and submitted to the clearinghouse.

The clearinghouse thereafter was given a second period of 30 days within which to complete prepara-

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regarding the relationship of the project proposal to existing plans for area development. 42 U.S.C. §3334. Title IV of the 1968 act provides that "all viewpoints—national, State, regional, and local—shall, to the extent possible, be taken into account in planning Federal or federally assisted development programs and projects," and that "to the maximum extent possible. . .all Federal aid for development purposes shall be consistent with and further the objectives of State, regional, and local planning." 42 U.S.C. §4231(b) and (c) (1970). The 1968 act directed the President to establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development. 42 U.S.C. §4231(a) (1970). The President has delegated this authority to the Director of OMB.

[407] In 1975, the Comptroller General of the United States issued a report to the Congress on the administration of Circular A-95 which included a finding that Circular A-95 had been inconsistently implemented by Federal agencies. The report, therefore, recommended that OMB provide clearer direction to agencies on their responsibilities. Comptroller General of the United States, *Report to the Congress: Improved Cooperation and Coordination Needed Among All Levels of Government—Office of Management and Budget Circular A-95* , 42 (Feb. 11, 1975) [hereinafter referred to as *Report by Comptroller General*] . Subsequently, OMB included among its revisions to Circular A-95 a requirement that agencies issue final regulations implementing the circular by Apr. 29, 1976. Circular A-95 (Revised), *supra* note 406. Agencies were directed to include in these regulations provisions covering many of the recommendations in the *Report by the Comptroller General* . See memorandum from Fernando Oaxaca, Associate Director for Management and Operations, to Heads of Certain Federal Departments and Agencies, "Agency Regulations for Implementing the New Revisions of OMB Circular No. A-95 (Oct. 10, 1975) [hereinafter referred to as Oaxaca Memorandum on A-95].

[408] Part I is often mistakenly thought to be the only section of the A-95 process. Remarks of Dwight A. Ink, Assistant Director, OMB, at the 1972 Conference of the American Society for Public Administration, in New York, Mar. 27, 1972. The circular is, however, divided into four parts. Part II, "Direct Federal Development," provides that Federal agencies engaged in direct development projects, such as military installations and public buildings, must consult with State and local governments which might be affected by the projects and must justify any departures taken from State, regional, or local plans. Part III, "State Plans," provides State Governors an opportunity to review plans submitted by their State agencies for those Federal assistance programs which require, as a condition of application, submission of a "State Plan" for implementation and administration of the proposed grant. Part IV, "Coordination of Planning in Multijurisdictional Areas," requires Federal agencies, in designating development districts, to give deference to the boundaries already established by State authorities and to establish procedures for reviewing multijurisdictional applications to ensure consistency with planning coordinated by the clearinghouses pursuant to Part I.

[409] More technically, the system is referred to as Project Notification and Review. It is described in OMB, *Circular A-95, What It Is, How It Works* (undated). See also testimony of Arnold R. Weber, Associate Director, OMB, *Hearing before the United States Commission on Civil Rights in Washington, D.C., June 14–17, 1971* at 350. The A-95 process was recently approved by a Federal district court in Hood River County v. United States, No. 75-92 (D. Ore. Dec. 1, 1975).

[410] These include programs involving construction, such as the Department of Housing and Urban Development's urban renewal program and the Department of Transportation's airport development aid program, as well as nonconstruction programs such as the Law Enforcement Assistance Administration's comprehensive planning assistance program and the Department of Labor's Comprehensive Employment Training Act Program. The programs covered are listed in OMB, Catalog of Federal Assistance, Appendix I, and in Attachment D of the circular. Some programs with significant civil rights implications, such as the Extension Service of the Department of Agriculture (USDA) have been exempted from A-95 review. For a discussion of the civil rights problems in the Extension Service, see *To Extend Federal Financial Assistance, supra* note 62 at 25-108. USDA's justifications for this exemption include the arguments that local leadership already involved in developing Extension programs would "resist still another level of Government administration" and the universities' decisions in administering the programs should not be reviewed by other agencies which may lack knowledge of the areas' educational needs. Letter from Charles W. McDougall, Deputy Administrator-Operations, Extension Service, Department of Agriculture, to Whitney Adams, Acting Assistant Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Feb. 23, 1976. USDA arguments do not appear to warrant this exemption. Opposition of a certain local institution to A-95 review to its programs does not justify excluding other public institutions from asserting their concerns about such programs. Moreover, many programs covered by Circular A-95 are administered by State and local government institutions, such as local planning agencies, which have special expertise.

[411] A State clearinghouse is a coordinating agency of the State government designated by the Governor or State law to participate in the A-95 review process. An areawide clearinghouse is a comprehensive planning agency. It is often a recipient of HUD assistance under Section 701 of the Housing Act of 1954, as amended, 40 U.S.C. §461 (1970). As of February 1976, there were approximately 530 clearinghouses covering 94 percent of the population and 76 percent of the land area in the continental United States. Telephone interview with William K. Brussat, management analyst, Intergovernmental Relations Branch, Intergovernmental Relations and Regional Operations Division, OMB, Feb. 6, 1976. See also, memorandum from Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, to Interested Parties, "Status of Areawide A-95 Clearinghouses" (Aug. 19, 1975). OMB added:

> There are two types of designation of areawide clearinghouses. Governors designate those in non-metropolitan areas, and OMB reserves the last word on designation of clearinghouses encompassing metropolitan areas. In the latter case, however, as a matter of policy, OMB seeks the Governor's concurrence in the designation. Oaxaca letter, *supra* note 22.

[412] If the applicant fails to submit a notice of intent, the clearinghouse is afforded 60 days to review the completed application. Circular No. A-95 (Revised), *supra* note 406, Attachment A, Part I (4)(c) at 2053.

tion of its comments and to gather the comments of other State and local government agencies.[413] Clearinghouse comments, which pertain to the proposed project's impact on the community and its relation to other programs, were to include any assessments submitted by any agencies or jurisdictions which were at variance with the clearinghouse view.[414] The applicant was to forward all comments from the clearinghouse to the Federal funding agency.[415]

OMB did not know to what extent clearinghouse comments were provided on applications. An extensive evaluation of the A-95 process, which OMB planned for the early spring of 1976, was to include an assessment of the percentage and types of applications receiving clearinghouse comment.[416] In December 1976, OMB noted:

> While OMB has had little means in the past for ascertaining whether or not applicants and agencies were complying with the Circular, the new Standard Form 424, may serve as an effective policing device. SF 424 is designed as an application face sheet for all applications from State and local government. It has three parts, the first two of which are filled out by the applicant. The first part is a description of the project, the second—certified by the applicant—identifies the clearinghouses to which the application was submitted and states that all comments are attached. The third part, completed by the funding agency, describes its action on the application and sends copies to the applicant and to the clearinghouses. This will provide a more effective check on A-95 compliance.[417]

Because the A-95 process was designed to be one of the chief sources of information on the potential impact of Federal assistance, the review could provide vital aid to the Federal Government in attempting to meet its legal obligation under Title VI of the Civil Rights Act of 1964[418] not to provide support to programs which discriminate on the basis of race or national origin.[419] Circular A-95 acknowledged that one of its four principal purposes is "[f]urthering the objectives of Title VI of the Civil Rights Act of 1964,"[420] but it failed to include provisions adequate for effectuating that aim.[421]

First, the circular did not require that an assessment be made of the impact of the proposed program on minorities. It merely listed civil rights as one of many topics[422] on which comment was permissible but not mandatory. OMB stated:

> OMB has explained that clearinghouses are not required to comment on any particular aspect of a project or comment at all. Such a requirement would be unworkable even if the Federal Government were to provide them with all the reasons necessary to comment on all the things they might comment on.[423]

Clearinghouses were notified that proposed projects may be evaluated to determine: "The extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups."[424] OMB staff believed that there was no statutory authority for prescribing the precise subjects to be covered in the A-95 process.[425] However, the Intergovernmental Cooperation Act of 1968,[426] on which Circular A-95 is based in part,[427] requires that State and local objectives "shall" be evaluated in the Federal grant process "within a framework of national policy objectives as expressed in Federal law. . . ."[428] One of the foremost national goals, as expressed in Title VI of the 1964 Civil Rights Act[429], is the elimination of race and national origin discrimination in federally assisted programs. Further, Federal agencies have been directed to use the full range of their administrative powers in effectuating the purposes of Title VI. Thus, there appears to be ample authority for requiring a civil rights analysis of prospective grants through the A-95 process.[430]

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[413] There are, thus, two 30-day periods involved, separated by an indeterminate period which runs from the time the clearinghouse advises the prospective applicant of its interest and the time the completed application is submitted to the clearinghouse for the review and comment. *Id*.

[414] *Id*. Attachment A, Part I(4)(d) at 2054.

[415] *Id*. Attachment A, Part I(4)(f)(1) at 2054.

[416] Brussat interview, *supra* note 411.

[417] Oaxaca letter, *supra* note 22.

[418] 42 U.S.C. §2000(d) (1970). Title VI is discussed extensively in *To Extend Federal Financial Assistance*, *supra* note 62.

[419] This Commission has mentioned OMB Circular A-95 as a possible tool for halting the increasing racial and ethnic polarization which characterizes many metropolitan areas. U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). The use of the A-95 process for civil rights evaluation is also discussed in National Committee Against Discrimination in Housing Inc. (NCDH), Bay Area Demonstration Project, *Civil Rights and the A-95 Review Process: Comprehensive Evaluation and Recommendations Concerning the San Francisco Bay Area* (July 1973) [hereinafter referred to as *Civil Rights Review Pilot Project*]. See also I. Sikorsky, Jr., "A-95: A Deterrent To Discriminatory Zoning," 5 *Civil Rights Digest* 16 (August 1972); and "Local Control over Federally Funded Projects," X. *New York Law Forum* 113 (1973); J. Vaitkus, Connecticut Commission on Human Rights and Opportunities, "Civil Rights and Circular A-95" presented at the 26th Annual Conference of the International Association of Official Human Rights Agencies [hereinafter referred to as "*Civil Rights and Circular A-95*"]; and Coalition for an Equitable Region, Suburban Action Institute, *A-95 Review Guide* (1975)

[420] Circular A-95 (Revised), *supra* note 406, §I(d) at 2052. OMB commented:

> One of the objectives of A-95, as the report notes, is "furthering the objectives of Title VI of the Civil Rights Act of 1964." It does this in the same way as it furthers other stated objectives of the Circular: by affording affected State and local government agencies, through the clearinghouses, with an opportunity to evaluate the proposed project in terms of their interests. Oaxaca letter, *supra* note 22.

[421] On several occasions the Commission has forwarded comments to OMB concerning the inadequacies of this circular for civil rights review. See letter from Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, to Arnold R. Weber, Associate Director, OMB, July 1, 1971; letter from John A. Buggs, Acting Staff Director, U.S. Commission on Civil Rights, to Dwight Ink, Assistant Director for Organization and Management Systems, OMB, Washington, D.C., Sept. 30, 1971; and letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Frederic V. Malek, Deputy Director, OMB, July 5, 1973.

[422] Other topics include State and local objectives, planning, transportation, environment, and energy resources. Circular No. A-95 (Revised), *supra* note 406, at Part I(5).

[423] Oaxaca letter, *supra* note 22. OMB also commented:

> Over the past few years, OMB has tried to be helpful to the Commission to explain OMB Circular A-95, what it is designed to accomplish, how it operates, its legal and practical limitations. The Commission, in its report, continues to misunderstand the Circular and make recommendations which, desirable or not, are unworkable. The most persistent of the Commission's criticisms of OMB concerning furthering civil rights actions is that it does not require of clearinghouses that they comment on the civil rights impact of each project that the clearinghouse reviews. *Id*.

A second major deficiency in Circular A-95 was its disregard of women. Strong national policy against sex discrimination is also reflected in a series of enactments related to specific Federal programs,[431] including Title IX of the Education Amendments of 1972. However, women were not mentioned in the circular as a population group to be taken into consideration.[432] This omission appears to be unwarranted in light of the numerous provisions enacted by the Congress banning sex discrimination in federally assisted programs.

The circular also failed to establish adequate mechanisms for securing civil rights comments. It instructed clearinghouses to provide agencies charged with enforcing or furthering the objective of State and local civil rights laws with an opportunity to comment "on the civil rights aspects of the project for which assistance is sought."[433] OMB did not systematically review clearinghouses, however, to ensure that they are adhering to this provision in the circular by notifying State and local civil rights agencies of project applications. Instead, OMB attempts to enforce the circular by responding to complaints.[434] This system does not appear to have been effective. In a random survey of 17 State and local civil rights agencies,[435] Commission staff found that at least 7 did not receive project notifications from their clearinghouses.[436] None of these agencies

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[424] Circular A-95 (Revised), supra note 406, Attachment A, Part (5)(h) at 2054.

[425] Brussat interview, *supra* note 411. The Associate Director for Management and Operations, who is responsible for directing OMB's role in coordinating Circular A-95, did not know why the circular failed to require a civil rights analysis. Oaxaca interview, *supra* note 306.

[426] 42 U.S.C. §4201 *et seq* . (1970).

[427] See note 406 *supra* .

[428] 42 U.S.C. §4231(b) (1970).

[429] 42 U.S.C. §2000d (1970).

[430] OMB commented:

> We seriously question whether the quoted section of the Intergovernmental Cooperation Act provide[s] the legal basis for such a requirement. That passage, requiring that State and local objectives be considered and evaluated within a framework of national public objectives, [is] expressed in Federal law. Is it the Commission's contention that it is the function of clearinghouses to interpret Federal law? *Clearly, that responsibility lies with the Federal agencies administering programs established by such laws, including Title VI* . Oaxaca letter, *supra* note 22.

The Commission's comments are not intended to imply that it is the function of clearinghouses to interpret Federal law.

[431] These enactments are discussed in *To Extend Federal Financial Assistance*, *supra* note 62, at 38-45, 223-26, 274, 397-98, 468, 525, and 607-11. See also the brief description of these enactments in note 162 *supra* .

[432] Although women are not mentioned in the circular, OMB has stated:

> A-95 does not "disregard" women. If women are considered as a disadvantaged group within the framework of civil rights legislation, then they are indeed covered, and clearinghouses should consider Commissions on the Status of Women as appropriate referral points within the meaning of paragraphs 1.d. and 3.e. of Part I, Attachment A of the Circular which references State and local civil rights agencies. Oaxaca letter, *supra* note 22.

[433] Circular No. A-95 (Revised) *supra* note 406, Attachment A, Part I(3)(e). For a time the reliance upon civil rights agencies was restricted to agencies with authority to enforce State or local civil rights laws. Circular No. A-95 (Revised) (Mar. 8, 1972). One of the steps taken by OMB in 1973 was to add a provision to the circular which permitted public civil rights agencies charged with furthering the objectives of State or local civil rights laws to be included among the agencies which were provided opportunity to review and comment on project proposals. In other words, enforcement powers were no longer necessary for participation in the A-95 process. OMB Circular No. A-95 Revised, Nov. 13, 1973.

[434] Brussat interview, *supra* note 411. In June 1974, responsibility for day-to-day oversight of A-95 was assigned to the Federal Regional Councils. There are, thus, now ten regional coordinators for A-95. These are generally staff assigned to the Councils or employees of the member agencies. The activities of the A-95 coordinators of the Councils are discussed in ch. 3 *infra* . As of February 1976, there was only one OMB staff member responsible for A-95.

[435] Telephone interviews with Galen A. Martin, executive director, Kentucky Commission on Human Rights, Feb. 6, 1976; Alvin Plummer, acting executive director, Missouri Commission on Human Rights, Feb. 6, 1976; Arthur L. Green, executive director, Connecticut Commission on Human Rights and Opportunities, Feb. 6, 1976; Homer Floyd, executive director, Pennsylvania Human Relations Commission, Feb. 6, 1976; Vivian Caver, director, Seattle, Washington, Human Rights Department, Feb. 9, 1976; James F. Reynolds, director, Colorado Civil Rights Commission, Feb. 9, 1976; Anthony D. Lopez, executive director, Kansas Commission on Civil Rights, Feb. 10, 1976; William Hale, director, Fort Worth, Texas, Human Relations Commission, Feb. 10, 1976; Charles E. Wilson, acting chief, California Fair Employment Practices Commission, Feb. 10, 1976; Ronald Lee, deputy director, Illinois Fair Employment Practices Commission, Feb. 11, 1976; Connie Seals, executive director, Illinois Commission on Human Relations, Feb. 11, 1976; Frank Baserra, executive director, New Mexico Human Rights Commission, Feb. 11, 1976; John Ahearn, field investigator, Massachusetts Commission Against Discrimination, Feb. 13, 1976. Interview with Robert Galer, chairman, Columbus, Georgia, Community Relations Commission, Feb. 14, 1976. Telephone interviews with Mary Lynn Myers, director, South Dakota Division of Human Rights, Feb. 19, 1976; John Stokes, executive director, Sioux City, Iowa, Human Rights Commission, Feb. 19, 1976; and J. William Becton, executive director, Durham, North Carolina, Human Relations Commission, Feb. 19, 1976.

[436] OMB added:

> OMB has recognized the fact that many clearinghouses do not have sufficient expertise in the civil rights area. We, therefore, provide that clearinghouses must give State and local civil rights agencies the opportunity to participate in the A-95 review process. They in turn should indicate (better than the clearinghouses) which non-governmental civil rights groups might be drawn into the review of any

knew of their right to receive such notifications nor of the opportunity to complain to OMB.[437]

OMB took only one limited step to notify State and local civil rights agencies of the A-95 process. In 1972, OMB mailed a copy of the circular and a notice of the nearby clearinghouse to all such agencies on a HUD list.[438] OMB did not contact the Equal Employment Opportunity Commission for its listing of State and local civil rights agencies, which had been periodically updated since 1972,[439] nor did OMB make any other efforts to encourage these agencies to participate.[440] OMB stated:

> However, we think it more proper that the Commission (or EEOC) whose major mission is civil rights inform these States and local civil rights agencies of their rights under A-95. OMB undertook to provide this information originally on the occasion of amending A-95 to reference civil rights. It would be impossible for OMB to maintain listings of all the State and local agencies which should appropriately be afforded an opportunity to comment on one or another aspect of applications submitted to clearinghouses for review. On civil rights matters, that is more appropriately a Commission function.[441]

This Commission disagrees. Responsibility for effective coordination of the A-95 process rests with OMB. As discussed in this section, State and local human rights agencies have encountered a number of problems with the A-95 process. Any agency serving as Federal A-95 liaison with these agencies should be empowered to respond to complaints, alter the A-95 process if necessary, and explain the process where change is not appropriate. This Commission is not in such a position.

OMB guidance on which civil rights agencies must be notified in the A-95 process was restrictive. Circular A-95 did not include private groups which exercise major responsibilities for protecting human rights.[442] OMB defends this omission by stating:

> OMB has explained before to the Commission why A-95 does not require, but only encourages, clearinghouses to involve non-governmental groups in the review process. If that were done for civil rights groups, then it would have to be done for all other groups with a legitimate interest in the process: environmental groups, business and professional groups, neighborhood associations, and others. To ask clearinghouses, particularly those in metropolitan areas, to keep track of the myriad interest groups that would need to be apprised and involved in the review of each application would be an unconscionable burden for the clearinghouses which, like many civil rights agencies, find themselves very limited in terms of funds and staff that they can devote to the A-95 review process.[443]

Circular A-95, however, made no mention of private civil rights groups. This was a significant omission because in some States and localities there were no public human rights agencies. In other areas, public agencies had neither funds[444] nor staff[445] to devote to full participation in the A-95 process, and

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> particular projects. If that opportunity has not been provided to any State and local civil rights agencies, OMB has not been apprised of this fact. We are surprised that the Commission, which has knowledge of widespread abuses of this requirement. . .has not brought them to OMB's attention. Although, as the Commission disparagingly notes, OMB monitors A-95 on a complaint basis only, we do try very hard to be responsive and to follow through on complaints. This is also true of the Federal Regional Councils. Our task is much facilitated when agencies, knowing of instances of noncompliance with A-95 requirements, call them to our attention so that we can take appropriate action to assure better compliance. Oaxaca letter, *supra* note 22.

While, of course, it is important for OMB to seek correction of specific instances of failure to implement fully Circular A-95, in this case, the most effective remedy would be to make across-the-board changes in the process of implementing that circular.

[437] Hale, Wilson, Lee, Baserra, Galer, Stokes, and Becton interviews, *supra* note 435. See also "Civil Rights and A-95 Review," *supra* note 419.

[438] Brussat interview, *supra* note 411. OMB found, through feedback from the clearinghouses, that the list was neither comprehensive nor accurate. OMB also directed the attention of the clearinghouses to the civil rights provision and advised them of their obligation to identify civil rights agencies and alert them to the availability of review. OMB made no further efforts to ensure that civil rights agencies were, in fact, aware of the provision for their participation.

[439] *Id*. EEOC, through its State and Local Division in the Office of Compliance Programs, certifies State and local agencies for investigating charges deferred by EEOC pursuant to Section 706 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5 (Supp. V, 1975). In carrying out this function, EEOC attempts to maintain a complete up-to-date listing of all State and local civil rights agencies. Telephone interview with Leona Holton, Acting Director, State and Local Division, Office of Compliance Programs, Equal Employment Opportunity Commission, Feb. 6, 1976. See EEOC, *Directory of State and Local Anti-Discrimination Agencies* (1975). OMB noted:

> When OMB discovered that the list of State and local civil rights agencies which had been provided by HUD was inaccurate, we asked the Commission if they had a more accurate listing or knew of someone who did, the staff response was negative. Actually, we think it unusual that the Commission, knowing of the EEOC listing, did not apprise OMB of it. Oaxaca letter, *supra* note 22.

The Commission staff member to whom OMB staff informally asked the question several years ago was not aware of the EEOC listing at that time.

[440] Oaxaca interview, *supra* note 306.

[441] Oaxaca letter, *supra* note 22.

[442] For example, as of February 1976, there were no State human rights agencies in Alabama, Mississippi, or Virginia.

[443] Oaxaca letter, *supra* note 22.

[444] The Federal Government provides no funds to State and local governments specifically for conducting the A-95 process. Lack of resources poses a serious problem for clearinghouse agencies. Telephone interview with Patty Rogow, administrative aide, Clearinghouse, Washington Council of Governments, June 13, 1973. It has also created a serious stumbling block to civil rights agencies' participation in the A-95 process.

[445] Martin, Plummer, and Reynolds interviews, *supra* note 435. The Director of the Connecticut Commission on Human Rights and Opportunities

private civil rights groups could have provided significant assistance in the A-95 process when it was necessary to supplement the effort of State and local government agencies.[446] Furthermore, OMB had not made clear whether the agencies eligible to review proposed projects included those furthering and protecting the rights of women, as well as those furthering and protecting the rights of minorities.[447]

Many of those State and local civil rights agencies which attempted to comment through the A-95 process concluded, for the most part, that the activity was not useful because their comments appeared to have been ignored.[448] Some of these agencies declined to participate in the process altogether,[449] while others commented only on grant proposals to Federal agencies which had been responsive in the past to local criticism.[450] Only one[451] of the State and local civil rights agencies contacted by the Commission indicated that it was satisfied with the response to its criticisms submitted during the A-95 review. The OMB deputy associate director with civil rights coordination responsibilities was unaware, however, of any difficulties experienced by State and local civil rights agencies in the A-95 process.[452]

A major problem faced by civil rights agencies, in addition to lack of adequate staff, was the lack of data provided on applications and prospective projects.[453] Some agencies developed questionnaire forms which were distributed to applicants either by the agency or the clearinghouse.[454] At least one agency, the Kansas State Commission on Civil Rights, attempted to implement a questionnaire procedure but was blocked by the clearinghouse,[455] which subsequently received OMB's support for the disapproval. OMB did not support the Kansas Commission in its efforts to obtain the information, stating that such requests for information were outside the jurisdiction of the A-95 process.[456] OMB informed this Commission:

> OMB believes that the burden upon applicants for Federal assistance is in many cases already far too onerous. To require that they supply information beyond that already required by the funding agency in order to satisfy more detailed or particular interests of clearinghouses or any other agency reviewing applications under A-95 would be inequitable. In "A-95: What It Is—How It Works," applicants are encouraged to supply additional information, if it is readily at hand and does not require the expenditure of additional resources. It is the applicant's judgment, however, as to whether or not he should respond to such requests for information beyond that required by the funding agency.[457]

(CCHRO) believes that the A-95 process is so important that it must be handled by at least two persons with full-time responsibilities for A-95 review. Green interview, *supra* note 435. The Massachusetts Commission Against Discrimination has also assigned two persons full time to A-95 review. Ahearn interview, *supra* note 435. One study concluded that a staff of six professionals was required to assess the civil rights implications of all applications processed through the State of California clearinghouse during 1972. *Civil Rights Review Pilot Project*, *supra* note 419, at 5.

[446] Some have concluded that community group participation is essential even if the State or local agency also comments. *Civil Rights Review Pilot Project*, *supra* note 419, at 42; and Seals and Ahearn interviews, *supra* note 435. OMB takes the position that it is the responsibility of State and local agencies, rather than clearinghouses, to obtain input from community groups. Telephone interview with William K. Brussat, Management Analyst, Intergovernmental Relations Branch, Intergovernmental Relations and Regional Operations Division, OMB, Feb. 10, 1976 [hereinafter referred to as Feb. 10, 1976, Brussat interview].

[447] While civil rights includes women's rights as well as minority rights, in almost all States there are separate commissions on the status of women, which should be given opportunity to comment on proposed Federal projects. See *Directory of State and Local Anti-Discrimination Agencies*, *supra* note 439. The Massachusetts Commission Against Discrimination routinely reviews projects for their impact on women as well as minority groups. Ahearn interview, *supra* note 435.

[448] Martin, Plummer, Green, Lopez, Floyd, and Myers interviews, *supra* note 435. Arthur F. Green, Chairman of the Federal Liaison Committee of the International Association of Official Human Rights Agencies [IAOHRA] indicated that most State and local civil rights officials held this view. Green interview, *supra* note 435. See also, *Report by the Comptroller General*, *supra* note 407, at 26.

[449] State civil rights agencies in Missouri, Kansas, and Pennsylvania do not submit comments. Plummer, Lopez, and Floyd interviews, *supra* note 435. The Pennsylvania agency uses the project notification as a triggering device for instituting investigations and enforcement actions under its own statute. Floyd interview, *supra* note 435.

[450] State agencies in Kentucky and Connecticut have adopted this approach. Martin and Green interviews, *supra* note 435. For example, the Connecticut Commission on Human Rights and Opportunities has found that the Department of the Interior has been responsive to its criticisms of proposed projects but that the Department of Housing and Urban Development has not. Green interview, *supra* note 435. The Massachusetts Commission Against Discrimination indicated that Federal agencies respond adequately to its complaints in approximately half of the instances. Ahearn interview, *supra* note 435.

[451] This agency was the Seattle Human Rights Department. Caver interview, *supra* note 435.

[452] Derman interview, *supra* note 88.

[453] Plummer, Lopez, Green, and Ahearn interviews, *supra* note 435.

[454] The Seattle Human Rights Department has developed such a questionnaire, which is distributed by the clearinghouse. Caver interview, *supra* note 435. The State commissions in Connecticut and Massachusetts send a questionnaire directly to applicants but have experienced difficulty in obtaining responses. Green and Ahearn interviews, *supra* note 435.

[455] Lopez interview, *supra* note 435. The Kansas commission questionnaire asked, for example, if the applicant had an approved affirmative action plan, whether minorities and women had been involved in the planning of the project, and whether minority residents would be displaced because of the project. The questionnaire was disapproved in a letter from James W. Bibb, Director of the Budget, Department of Administration, State of Kansas, to Anthony Lopez, Director, Kansas State Commission on Civil Rights, Feb. 19, 1974.

[456] Letter from Robert H. Marik, Associate Director for Management and Operations, OMB, to Harriet Graham, contract compliance representative, Kansas State Commission on Civil Rights, June 18, 1974.

[457] Oaxaca letter, *supra* note 22.

Since several items on the questionnaire appeared to be minimal inquiries necessary for a civil rights review, the rejection of the questionnaire left the Kansas Commission at a loss to determine how it could conduct a civil rights review, as permitted in Circular A-95. OMB offered no guidance to the Kansas Commission on how to conduct a review in the absence of the information it needed. The Kansas Commission largely withdrew from the A-95 process.[458] It reduced its involvement to attaching to each proposal a standard statement to the effect that the applicant must comply with pertinent State civil rights laws.[459] In late 1975, OMB indicated that it would include in a revision of its basic handbook, *A-95 What It Is and How It Works*,[460] a guideline on the type of data that may be collected from applicants during the A-95 review.[461]

Another major deficiency in the A-95 process was the lack of OMB review of Federal agencies' implementation of their responsibilities.[462] The circular required agencies to ensure that applications for their grant programs were submitted through appropriate clearinghouses.[463] In addition, agencies were to notify clearinghouses within 7 days of any "major" action taken.[464] If an agency approved an application which a clearinghouse recommended against funding, the agency was required to provide the clearinghouse with an explanation of its action.[465] OMB did not monitor agencies to ensure that they adhere to this "feedback" requirement.[466] In 1974, after an audit by the Comptroller General of the United States had found widespread agency noncompliance with this provision,[467] OMB indicated that it expected "improved performance in agency response to A-95 requirements" as a result of a delegation of certain A-95 responsibilities to Federal Regional Councils.[468] However, the Commission's survey in February 1976 found that many State and local civil rights agencies appear not to receive explanations from Federal agencies which fund projects that State or local agencies have claimed to be potentially discriminatory.[469]

The lack of "feedback" to State and local civil rights agencies may have been due to a continued failure of Federal agencies to abide by the circular's requirement. It may also have been due to a failure in the circular to require Federal agencies to provide an explanation when a State or local civil rights agency submitted criticisms at variance with clearinghouse comments.[470] Neither were agencies required to establish procedures to ensure that civil rights criticisms received through the A-95 process reached agency officials with civil rights enforcement responsibilities.[471] OMB commented that "[T]he new Standard Form 424 should do much to correct the feedback deficiency of Federal agency A-95 implementation."[472]

Commission inquiries of A-95 liaison officers for 10 of the major Federal funding departments and agencies revealed that none of the agencies had developed any formal procedures for investigating complaints submitted by State and local civil rights agencies through the A-95 process[473] concerning proposed projects for Federal assistance. Procedures requiring agency investigation of such discrimination complaints could not only facilitate agencies' enforcement of their civil rights responsibilities, but could also provide assurance to State and local civil rights agencies that their participation in the A-95 process would be a worthwhile endeavor.

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[458] Lopez interview, *supra* note 435.

[459] *Id*.

[460] As of February 1976, a revision in this handbook was scheduled for March or April 1976. Brussat interview, *supra* note 411.

[461] In February 1976, OMB staff indicated that the guideline would permit collection of data already required by the Federal grantor agency. Feb. 10, 1976, Brussat interview, *supra* note 446. For another example of a State agency's difficulty in obtaining information on applicants, see letters from Arthur L. Green, director, Connecticut Commission on Human Rights and Opportunities, to James H. Blair, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Aug. 18, 1975; to Carol M. Thomas, Director, Office of Civil Rights and Urban Affairs, Environmental Protection Agency, Oct. 3, 1975; and to Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, Aug. 18, 1975.

[462] For a detailed discussion of this point, see *Report by the Comptroller General*, *supra* note 407, at 29–41. Lack of OMB oversight of agencies' A-95 programs was indicated in a 1973 survey which found that only one of nine major departments and agencies knew of the civil rights provisions in the circular almost one year after these provisions had been added. *Civil Rights Review Project*, *supra* note 419, at 38–39.

[463] Circular No. A-95 (Revised) *supra* note 406, Attachment A, Part I(6)(b), at 2054.

[464] *Id*. Attachment A, Part I (6)(c) at 2054. "Major actions" include awards, rejections, deferrals, and returns for amendments. *Id*. One group has recommended that Federal agencies be required to report back to the clearinghouse before any funding decision is made so that State and local officials, the applicant, and the Federal agency may have the opportunity to reach an accommodation. *Civil Rights Review Pilot Project*, *supra* note 419, at 37–38.

[465] Circular No. A-95 (Revised), *supra* note 406, Attachment A, Part I (6)(d), at 2054.

[466] Feb. 10, 1976, Brussat interview, *supra* note 446.

[467] *Report by the Comptroller General*, *supra* note 407, at 39–41.

[468] Letter from Robert H. Marik, Associate Director for Management and Operations, OMB, to Victor Lowe, Director, General Government Division, General Accounting Office (Nov. 7, 1974). Federal Regional Councils are responsible for maintaining A-95 coordinators who respond to complaints. Interview with Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, Feb. 13, 1976. OMB views its role with regard to Circular A-95 in terms of encouraging departments and agencies to follow the A-95 requirements. Marik letter, *supra* note 456. See also Memorandum from Roy L. Ash, Director, OMB, to Federal Regional Council Chairmen, "OMB Circular No. A-95: Field Implementation," June 25, 1974.

[469] Martin, Plummer, Green, Lopez and Floyd interviews, *supra* note 435.

[470] As noted previously, comments at variance with the clearinghouse comments must be included with the clearinghouse submissions. Circular A-95 requires Federal agencies to provide explanations of their funding actions only when such actions are contrary to the recommendation of the clearinghouse and not when contrary to a minority view attached to the clearinghouse comments. Circular No. A-95 (Revised), *supra* note 406, at Part I(6)(d).

[471] Feb. 10, 1976, Brussat interview, *supra* note 446.

[472] Oaxaca letter, *supra* note 22.

After Commission inquiries were made, the A-95 Liaison Officer for the Department of the Interior (DOI) asked the DOI Office for Equal Opportunity (OEO) for suggestions regarding the Department's draft A-95 regulations. In response, the OEO Director proposed that the regulations include a section providing for OEO review of any civil rights objections raised through the A-95 process. In addition, OEO proposed that the DOI regulations require applicants to submit a civil rights impact statement and encourage clearinghouses to inform civil rights organizations of the A-95 process.[474] DOI adoption of these proposals could provide an excellent model for other agencies and departments to follow in improving the A-95 process.

VIII. Conclusion

In November 1976, a draft of this chapter was provided to the Office of Management and Budget for review and comment. OMB's specific comments on the draft are reflected throughout this chapter in connection with the sentences, paragraphs, and sections of the report to which they pertain. Several of OMB's comments, however, particularly in the introduction and conclusion of its letter to this Commission's Staff Director, were general in nature and not related to specific portions of the text. In our conclusion to this chapter, we have, therefore, printed OMB's general comments with our response.

> Executive Office of the President
> Office of Management and Budget
> Washington, D.C. 20503
> December 21, 1976
>
> Mr. John A. Buggs
> Staff Director
> United States Commission on Civil Rights
> Washington, D.C. 20425
>
> Dear Mr. Buggs:
>
> I regret the delay in providing you comments more expeditiously on the voluminous draft report we received from the Commission regarding OMB and its activities in the civil rights field. Quite frankly, what made the task so time consuming were the many inaccuracies in fact and the misunderstanding of OMB, its mission and its past actions reflected in the draft. Particularly difficult was devising reasonable response to the many comments directed at personalities and individuals in OMB and the, at times, emotional statements made in the report which, rather than focusing on substance, reflected apparent preconceived notions that OMB is either negligent, insensitive or overly opposed to appropriate civil rights efforts in the Executive Branch. . . .
>
> . . .The above sampling of comments would appear to be a powerful indication of a need to reexamine the data gathering of Commission investigators. The reference here is not only to the quality of the interviews in terms of accuracy and comprehension of data transmitted, but more importantly with regard to the inferential leaps made by staff writers of a report of this nature which is so strongly based on personal opinion, almost no quantitative data and, frankly, some paucity of professional objectivity. . . .
>
> . . . *Summary* The preceding comments and those in the appendices speak for themselves. The draft report of the Commission requires a major rework, maybe additional field work by Commission staff and certainly another review by OMB of the revised product. At this point we would not consider it anything other than a possibly well intentioned, but poorly staffed, poorly researched and strongly biased

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[473] Telephone interviews with James Brennan, Office of the Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development, Feb. 10, 1976; Don Manns, A-95 Liaison Officer, Office of Operations, Department of Agriculture, Feb. 10, 1976; Warren Dahlstrom, Special Assistant, Intergovernmental Coordination, Office of Management Consulting, Department of the Interior, Feb. 10, 1976; Donna Vankirk, Grants Program Analyst, Grants Administration Division, Environmental Protection Agency, Feb. 11, 1976; Sam Hirabayashi, Office of Assistant Secretary for Administration, Department of Labor, Feb. 11, 1976; Gary Houseknecht, Chief, Intergovernmental Relations and Public Policy Branch, Division of Grants Policy and Regulations Development, Department of Health, Education, and Welfare, Feb. 11, 1976; Charles Ventura, Office of Assistant Secretary for Administration, Department of Transportation, Feb. 13, 1976; John Minor, Soil Conservation Service, Department of Agriculture, Feb. 11, 1976; Bernard Richert, Economic Development Administration, Department of Commerce, Feb. 19, 1976; and Don James, Law Enforcement Assistance Administration, Department of Justice, Feb. 20, 1976.

[474] Memorandum from Edward E. Shelton, Director, Office for Equal Opportunity, Department of the Interior, to Special Assistant for Intergovernmental Coordination, Feb. 23, 1976.

criticism of many Federal agencies which are depicted in an indefensible way as having a negative civil rights stance, all within a report whose quality does not compliment the mission, reputation and integrity of the U.S. Commission on Civil Rights.

Please let me know what can be done to resolve our differences, how we can further cooperate with the Commission to clarify any misunderstandings and to assist with presentation of legitimate concerns in a productive and fruitful manner. I wish to assure you of my personal cooperation and the assistance of OMB staff to formulate actions which can truly advance the proper implementation of statutory requirements involving civil rights in Federal programs and operations.

Fernando Oaxaca
Associate Director for Management and
Operations

We have carefully reviewed OMB's response to this Commission's draft chapter on OMB. OMB's general comments challenge the quality of the report and the methodology used in preparing it. OMB questions this Commission's understanding "of OMB, its mission and its past actions. . . ." OMB refers to "many inaccuracies in fact" in the chapter and calls the chapter "poorly researched." We have concluded, however, from the specific examples OMB provided in support of its criticism, that the basic disagreement between this Commission and OMB concerns the role OMB can and should play in the enforcement of Federal civil rights law. Thus, the differences that remain between OMB and this Commission are primarily ones of judgment, not fact.

We stand by the quality of this report and its interpretation of OMB's civil rights potential. It is the Commission's view that OMB's role in preparing the Federal budget, developing management review systems, supervising Federal statistical collection, and clearing legislative proposals from Federal departments and agencies offers OMB the opportunity and responsibility for significantly improving the performance of the executive branch in enforcing this Nation's civil rights laws.

OMB has requested that the draft be revised and that OMB be given a second opportunity to review it. After reading OMB's comments, however, this Commission has concluded that those comments do not support OMB's contention that the draft needs "major rework." We have corrected the few factual errors OMB has called to our attention, and where OMB's comments reflected a difference of opinion from that expressed in the report, we have quoted OMB's exact language. This is the extent of the "rework" we have undertaken.

Chapter 3

FEDERAL REGIONAL COUNCILS (FRCs)

Member Agencies:

- Department of Agriculture (USDA)
- Department of Commerce (DOC)
- Department of Health, Education, and Welfare (HEW)
- Department of Housing and Urban Development (HUD)
- Department of the Interior (USDI)
- Department of Labor (DOL)
- Department of Transportation (DOT)
- Community Services Administration (CSA)
- Environmental Protection Agency (EPA)
- Federal Energy Administration (FEA)
- Law Enforcement Assistance Administration (LEAA) of the Department of Justice (DOJ)

I. PROGRAM RESPONSIBILITIES

The Federal Regional Councils,[1] 1 in each of the 10 Federal regions, function as intergovernmental mechanisms for 11 grantmaking Federal agencies.[2] Their main responsibility, as established in 1972 by Executive Order 11647, is to improve the delivery of services to the public through coordination with State and local governments.[3]

Through Executive Order 11731, the President directed the Federal Regional Councils to perform eight functions:

(1) the development of better ways to deliver the benefits of Federal programs over the short term;

(2) the development of integrated program and funding plans with Governors and local chief executives;

(3) the encouragement of joint and complementary Federal grant applications by local and State governments;

(4) the expeditious resolution of conflicts and problems which may arise between Federal agencies;

(5) the evaluation of programs in which two or more member agencies participate;

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[1] OMB stated:

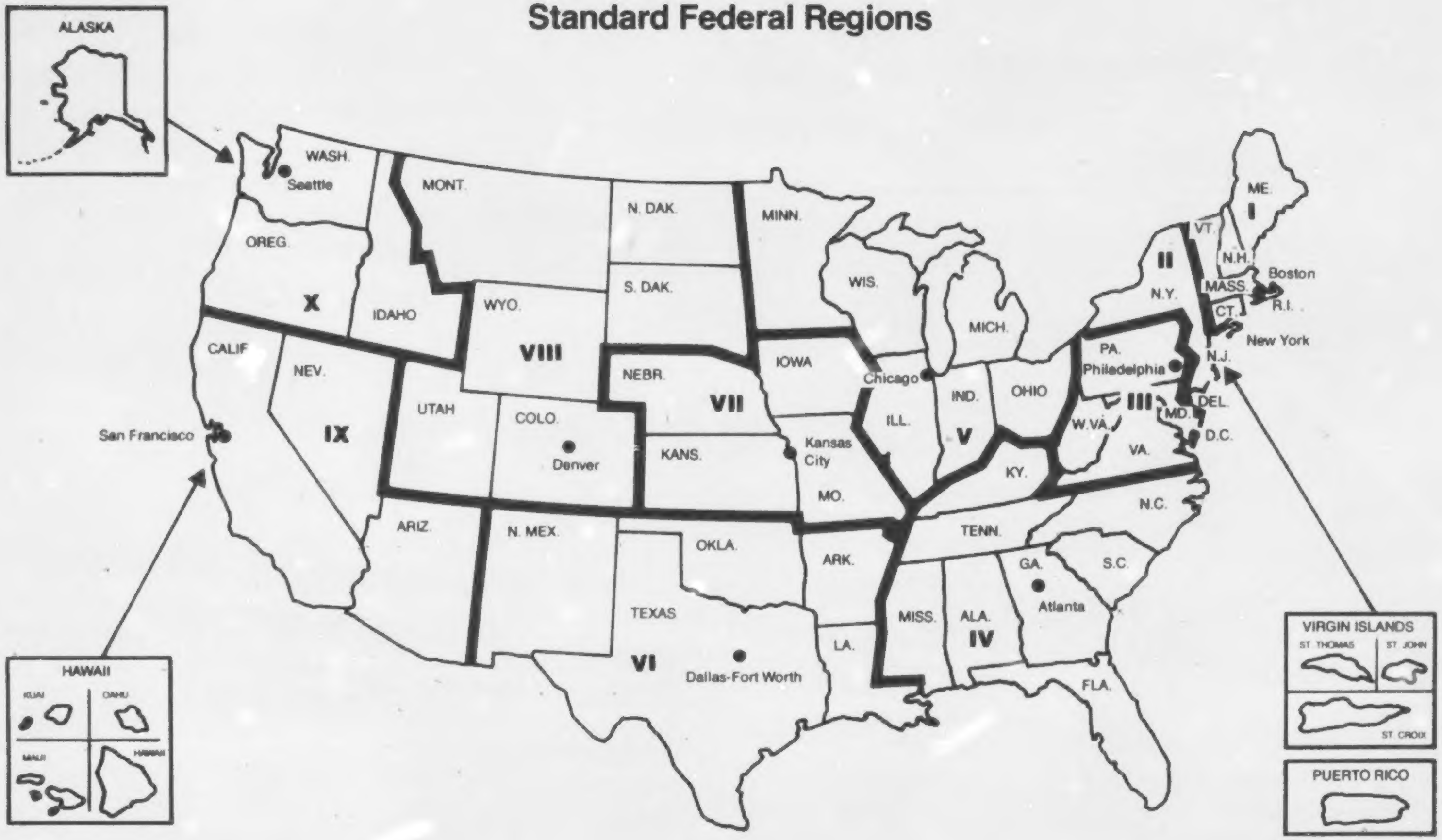
> Overall, Boston, Chicago, Dallas, and San Francisco feel that this is a good report (as it deals with Chapter III on FRCs), timely and should help sharpen the focus on FRC responsibilities on the multi-faceted issue of civil rights. While the FRCs do not agree with all of the interpretations and conclusions made by the Commission they do recognize the Commission's right to draw its own findings even though the same may have unwarranted negative overtones. Letter from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Dec. 21, 1977.

[2] As shown on exhibit 3.1, the 10 regions and the cities in which the regional offices are based are: Region I—Boston, Mass.; Region II—New York, N.Y.; Region III—Philadelphia, Pa.; Region IV—Atlanta, Ga.; Region V—Chicago, Ill.; Region VI— Dallas-Fort Worth, Tex.; Region VII—Kansas City, Mo.; Region VIII—Denver, Colo.; Region IX—San Francisco, Calif.; and Region X—Seattle, Wash. In connection with this report, Commission staff in fiscal years 1972 and 1973 conducted personal interviews in Federal Regional Council offices in Regions I, IV, V, and IX. In order to obtain more recent information, numerous telephone interviews were also conducted with FRC staff. In addition, many documents were studied, including work plans and annual reports from the FRCs in these four regions. Personal and telephone interviews were also conducted with a number of Washington-based Federal officials with duties relating to Federal Regional Councils. Regions I, IV, V, and IX were selected because the regions contain significant numbers of different minorities and varying minority problems as well as varying industrialization, wealth, and population traits.

[3] In 1969, pilot Federal Regional Councils were established as part of the Federal Assistance Review (FAR) program of the Nixon administration. According to President Nixon, "Primary emphasis was placed on improving the operation of Federal programs to strenghthen the capacity of State and local governments." Other components of the FAR program included the decentralization of decisionmaking authority and the creation of standard Federal regions. See *Public Papers of the Presidents of the United States: Richard Nixon 1972* , 97 (1974). The pilot Councils established in 1969 were in Atlanta, Chicago, New York, and San Francisco. According to the Presidential directive, they were to identify conflicting agency programs and policies and coordinate agency actions to improve the effectiveness of Federal programming at the regional level. The agencies represented on these original Councils were the Departments of Health, Education, and Welfare and Housing and Urban Development; the Office of Economic Opportunity; and the Manpower Administration of the Department of Labor. In 1972 the Department of Transportation, the Environmental Protection Agency, and the Law Enforcement Assistance Administration were added to the Councils. Exec. Order No. 11647, 3 C.F.R., 1972 Comp., p. 146. In 1973 the Departments of Agriculture and the Interior were added. Exec. Order No. 11731, 3 C.F.R., 1973 Comp., p. 199. In late 1975 the Department of Commerce and the Federal Energy Administration were added. Exec. Order No. 11892, 41 Fed. Reg. 751 (1976). For the early history and functioning of the Federal Regional Councils see M. Derthick & G. Bombardier, *Between State and Nation: Regional Organizations in the United States* (1974); M. Mogulof, *Federal Regional Councils: Their Current Experience and Recommendations for Further Development* (1970); Mogulof, "The Federal Regional Councils: A Potential Instrument for Planning and Joint Action," 44 *Social Service Review* 132 (1970).

Exhibit 3.1

Standard Federal Regions


ALASKA
WASH.
Seattle
MONT.
N. DAK.
MINN.
OREG.
X
IDAHO
WYO.
VIII
S. DAK.
WIS.
MICH.
CALIF.
NEV.
IX
San Francisco
UTAH
COLO.
Denver
NEBR.
VII
KANS.
IOWA
Chicago
ILL.
IND.
V
OHIO
Kansas City
MO.
ARIZ.
N. MEX.
OKLA.
TEXAS
VI
Dallas-Fort Worth
ARK.
LA.
MISS.
ALA.
IV
TENN.
KY.
GA.
Atlanta
S.C.
N.C.
FLA.
VA.
W.VA.
III
PA.
Philadelphia
MD.
DEL.
D.C.
N.J.
N.Y.
II
New York
VT.
N.H.
ME.
I
MASS.
Boston
CT.
R.I.
HAWAII
KUAI
OAHU
MAUI
HAWAII
VIRGIN ISLANDS
ST. THOMAS
ST. JOHN
ST. CROIX
PUERTO RICO

Source: 40 Fed. Reg. 45008 (Sept. 30, 1975).

(6) the development of more effective ways of allocating Federal resources to meet the long-range needs of State and local communities;
(7) the supervision of regional interagency coordination mechanisms; and
(8) the development of administrative procedures to improve day-to-day cooperation on an interagency and intergovernmental basis.[4]

The Associate Director for Management and Operations of the Office of Management and Budget (OMB)[5] described the role of the FRC as coordinating specific Federal activities at the regional level and providing a forum for discussion of intergovernmental problems.[6]

Executive Order 11731 directs that activities of the Federal Regional Councils generally be overseen by the Under Secretaries Group for Regional Affairs (USG). Specifically, the Under Secretaries Group is to "establish policy with respect to Federal Regional Council matters, provide guidance to the Councils, respond to their initiatives, and seek to resolve policy issues referred to it by the Councils."[7] In 1974 the USG described its role as:

> an interagency mechanism at the Washington level which will provide active leadership and administrative policy in a unified manner to the Federal Regional Councils in the areas of interagency policy guidance, intergovernmental relations, and program coordination.[8]

In attempting to provide leadership to the Councils, USG relies upon OMB for staff support, coordination, and leadership.[9] In particular, the Under Secretaries Group issues guidelines to be considered by the Councils in selecting priority programs.[10]

For fiscal year 1976, for example, the guidelines encouraged the Councils to develop programs to expand working relationships with State and local governments; to provide Federal budget briefings to State and local officials upon request; to implement OMB Circular No. A-95;[11] to coordinate and simplify Federal planning activities; to enhance the ability of State and local governments to plan, implement, and manage governmental programs; to analyze the social and economic impacts of energy development activities; and to deliver services in areas such as natural disaster recovery and the resettlement of Cambodian and Vietnamese refugees.[12] These guidelines served to translate, clarify, and specify the Executive orders, thereby exerting a strong influence on FRC activities. Councils implemented these guidelines through the use of budgetary appropriations for member agencies; the Councils themselves do not have budgets.[13]

OMB observed that:

> Throughout the chapter, Federal Regional Councils are viewed primarily as implementing agents for policy directives emanating from OMB and the Under Secretaries Group (USG). For example, the report seems to imply that Councils deserve special commendation for taking any initiatives in the absence of formal guidelines from the USG. . . .We recommend that the background section of this chapter give more recognition to the decentralized nature of the Federal Regional Council system including initiatives to foster greater decentralization of Federal activities and decisionmaking to field officials.[14]

It should be made clear that it is not mandatory that the Federal Regional Councils adopt projects suggested by USG guidelines,[15] and in some instances, the Councils also have taken the initiative to address problems not specifically covered in the guidelines.[16] However, an examination of FRCs in the New England, Chicago, Southwest, and Western regions revealed that the Councils usually have supported USG-suggested programs,[17] which comprised the bulk of the FRC activities.

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[4] Exec. Order No. 11731, *supra* note 3, at 200.

[5] OMB's role is discussed in sec. II(H) *infra* .

[6] Interview with Fernando Oaxaca, Associate Director for Management and Operations, OMB, Jan. 27, 1976.

[7] Exec. Order No. 11731, *supra* note 3, at 201. The Under Secretaries Group is currently composed of the Under Secretaries of the Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; the Interior; and Labor; the Deputy Secretary of Transportation, the Deputy Director of the Community Services Administration, the Deputy Administrator of the Environmental Protection Agency, the Deputy Administrator of the Federal Energy Administration, the Administrator of the Law Enforcement Assistance Administration, an Associate Director of the Domestic Council, and the Deputy Director of the Office of Management and Budget who chairs the USG. Exec. Order No. 11892, *supra* note 3, at 751-52. In addition, four Federal agencies acted as ad hoc members of the Under Secretaries Group, as of December 1976. These agencies were the Department of the Treasury, the Civil Service Commission, the Energy Research and Development Administration, and the General Services Administration. Oaxaca letter, *supra* note 1.

[8] OMB, *FRC System Guidelines for FY 1975* 1 (1974) [hereinafter referred to as *FY 1975 FRC Guidelines*].

[9] Oaxaca interview, *supra* note 6. For a more detailed discussion of OMB's role with regard to USG and the FRCs, see sec. III *infra* .

[10] For further discussion of these guidelines and their purposes, see sec. III *infra* .

[11] For a discussion of OMB Circular No. A-95, see sec. IV(B) *infra*.

[12] OMB, *FY 1976 FRC Guidelines: Role, Guidance, and Management* 3-9 (1975) [hereinafter referred to as *FY 1976 FRC Guidelines*].

[13] Oaxaca interview, *supra* note 6.

[14] Oaxaca letter, *supra* note 1.

[15] Interview with Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, Feb. 13, 1976.

[16] For example, USG's 1976 guidelines did not specifically direct the Federal Regional Councils to develop coastal zone management programs, but in 1976 the Southwest FRC supported such a program for the Gulf Coast at the request of States within the region. Federal Regional Council, Region

Some Council programs have experienced substantial success.[18] For example, OMB officials reported that the Region III Council did an effective job in coordinating long-term disaster relief after Hurricane Agnes[19] in 1972. The Council initially responded to a flood in the Wilkes-Barre, Pennsylvania, area by sending 10 to 12 staff members to help provide social services for evacuated persons.[20] More important, the Council subsequently coordinated the activities of several member agencies to provide relief through Federal housing, urban renewal, and transportation funds.[21]

Similarly, the New England Regional Council reported that it reacted effectively in working with officials of Chelsea, Massachusetts, after a major fire destroyed 20 percent of that city in 1973.[22] The Council coordinated Federal services of several agencies to deal with problems caused by the fire.[23]

The Councils appear to have effectively performed in nondisaster circumstances as well, demonstrating their potential contribution, given the cooperation of member agencies. In the Western region, officials reported that the Federal Regional Council achieved considerable and noteworthy progress in several areas.[24] For example, the Council initiated an energy development project with State and local officials in Region IX and expected to coordinate closely with a related program in Region X.[25] Council officials in both regions reported that they have many natural resource problems in common and that they kept in weekly contact in this area.

Other examples of successful programs were found in projects of the New England Regional Council. According to the staff director, during fiscal years 1973 and 1974 Council members effectively coordinated their activities in Massachusetts and Rhode Island to ease the impact of the Federal Government's closing of military bases.[26] More recently, the Council helped ease intense State and local concerns flowing from the energy crisis.[27] In particular, the Council identified all Federal agencies with associated responsibilities[28] and created an energy resource development task force which helped to accelerate the implementation of State and Federal resource development programs.[29]

II. ORGANIZATION AND STAFFING

Eight major elements characterize the organization and staffing of the Federal Regional Councils. Five of these—the Council members, Council chair-

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VI (Southwest), *Work Plan Fiscal Year 1976* 49 (1975) [hereinafter referred to as *Southwest FY '76 Work Plan*]. Similarly, during fiscal year 1976, the New England Federal Regional Council maintained a task force to improve government programs aimed at rehabilitating criminal offenders, although this subject was not emphasized in USG's 1976 guidelines. See Federal Regional Council, Region I (New England), *Fiscal Year 1976 Work Program* 41 (Aug. 19, 1975) [hereinafter referred to as *New England FY '76 Work Program.*]

[17] See *New England FY '76 Work Program, supra* note 16; Federal Regional Council, Region V (Chicago), *Annual Work Plan Fiscal Year 1976* (July, 1975) [hereinafter referred to as *Chicago FY '76 Annual Work Plan*] ; *Southwest FY '76 Work Plan, supra* note 16; Federal Regional Council, Region IX (Western), *Work Plan Fiscal Year 1976* (August 1975) [hereinafter referred to as *Western FY '76 Work Plan*] .

For a discussion of FRC activities prior to fiscal year 1976, see, e.g., Federal Regional Council, Region VI (Southwest), *Work Plan Fiscal Year 1974-75* (Aug. 15, 1974) [hereinafter referred to as *Southwest FY '75 Work Plan*] ; Federal Regional Council, Region I (New England), *FY 75 Annual Report for the Federal Regional Council, Region I* (June 16, 1975) [hereinafter referred to as *New England FY '75 Annual Report*] ; Federal Regional Council, Region V (Chicago), *Annual Report Fiscal Year 1975* (August 1975) [hereinafter referred to as *Chicago FY '75 Annual Report*] ; Federal Regional Council, Region IX (Western), *Annual Report for FY '75* (Sept. 3, 1975) [hereinafter referred to as *Western FY '75 Annual Report*].

[18] The Office of Management and Budget has periodically stated that the Federal Regional Councils have gone far toward accomplishing their missions. In reviewing work plans for fiscal year 1975, OMB noted that recent annual reports had demonstrated "a fairly high level of accomplishment against previously stated objectives." Attachment to memorandum from Robert H. Marik, Associate Director for Management and Operations, OMB, to the Under Secretaries Group, "Review of FRC Annual Reports and FY 75 Work Plans," Aug. 26, 1974, at 1. OMB further observed that 31 out of 58 FRC objectives for fiscal year 1974 were "either on target and continuing, or completed and no longer necessary." Of the remaining 27 objectives, 11 were "dropped as infeasible," and 16 were continuing to be addressed by the FRCs. OMB's view was that "most Councils feel they [have] made substantial progress in developing better lines of communication with State and local governments." Further, the Office of Management and Budget believed that the FRCs had made "especially significant" accomplishments in fiscal year 1974 by addressing unforeseen problems, including the energy crisis and the closing of military bases. *Id* .

[19] Interview with Paul O'Neill, Deputy Director, OMB, Mar. 4, 1976; telephone interview with J. Paul Royston, Chief, Field Systems Branch, Division of Intergovernmental Relations and Regional Operations, OMB, Mar. 22, 1976.

[20] Royston interview, *supra* note 19.

[21] *Id* . According to the Chief of OMB's Field Systems Branch, during and after the crisis the Council's activities were of particular assistance to the elderly of the Susquehanna region of Pennsylvania. *Id* .

[22] Telephone interview with Maureen E. Strickler, Staff Director, New England Federal Regional Council, Mar. 23, 1976.

[23] *Id* . The Council attempted to promote recovery in Chelsea for approximately 1 year after the fire. *Id* .

[24] Telephone interviews with Webster Otis, Chairman, and Alan Raznick, Acting Staff Director, Western Federal Regional Council, Mar. 24, 1976.

[25] *Id* . The first major meeting between officials of the two Councils was planned for April 1976, with solar and geothermal energy development as prime topics of discussion. *Id* .

[26] Strickler interview, *supra* note 22. The closing of these bases produced a loss of some 32,000 jobs in these States, with the accompanying loss of more than $300 million to New England's regional economy. In "significantly offsetting the loss," the FRC provided necessary budget information to the States which facilitated their planning in the areas of personpower, public works, and welfare. See "Objectives Fiscal Year 1974," at 1-2, attached to Federal Regional Council, Region I (New England), *Final Report: New England Federal Regional Council FY 1974* [hereinafter referred to as *New England FY '74 Final Report*].

[27] Strickler interview, *supra* note 22.

[28] *Id* . See also *New England FY '76 Work Program, supra* note 16, at 27–29.

[29] *New England FY '76 Work Program, supra* note 16, at 27–29.

men, FRC staffs, staff directors, and FRC committees—are located in each region. Three Washington-based components include the Under Secretaries Group for Regional Operations, the Under Secretaries Working Group, and an OMB representative to each Council.

A. Council Members

Council members are the senior regional officials of the member agencies.[30] These officials therefore have major Federal responsibilities, and some have substantial control over Federal funds.[31] Other Federal officials,[32] including the regional directors of Federal nonmember, grantmaking agencies, may attend Council meetings as ad hoc members when Council business relates to their agencies.[33] Occasionally State or local officials also have participated as nonvoting members of the Councils. In Boston, the New England Regional Commission[34] has participated in Council activities, and the Federal Chairperson of that Commission[35] has served as an associate, nonvoting member. Furthermore, each Governor in New England assigned a liaison to attend Council meetings on a periodic basis.

B. Council Chairman

Each chairman is designated by the President from among the Council members.[36] Thus, the President has more influence over Federal Regional Councils than over the Federal Executive Boards,[37] whose chairmen are elected by Board members.[38]

Typically, the chairman's tenure is 1 fiscal year; the duties include establishing the Council agenda, chairing meetings, and providing focus for Council discussion.[39] While lacking direct authority over other members, the chairman is responsible for mediating controversial issues and resolving interagency conflicts. The chairman also represents the Council in contacts with the public, other agencies, other Regional Councils, and the Under Secretaries Group.[40] In general, she or he must supervise and coordinate the effective implementation of all Federal Regional Council activities. In the regions visited by Commission staff,[41] chairmen spent approximately one-half of their time on Council business in addition to their duties as regional directors of Federal agencies.

C. Council Staff

The staff of each Regional Council is composed of a secretariat and administrative and clerical support. The secretariat usually consists of one senior level staff member assigned from each of the member agencies.[42] It is headed by a staff director.[43] The secretariat is responsible for the daily organization and implementation of the Council's work. Staff members serve in the dual capacity of staff to the Regional Council and as the special assistants to their regional directors for all Council matters. As members of the staff, they are responsible for assisting in planning and monitoring all Council activities. Specifically, it is their task to help identify problems, formulate issues of interagency concern, make recommendations on such issues, and evaluate program progress.[44] In the capacity of assistants to their regional directors, staff members represent the interests of their respective agencies in all Council matters.[45] They are responsible for bringing to the secretariat a thorough knowledge of their agencies' operating procedures and perspectives on issues raised or programs planned by the Council.[46] In addition to the day-to-day development of projects, the Council staff coordinates special activities suggested to the Federal Regional Council by the Under Secretaries Group.[47]

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[30] These normally include the Secretarial Representative of the Department of Transportation and the regional directors or administrators of the other member agencies.

[31] OMB stated:

> . . .the majority of Council members. . .exercise relatively little or no substantive control over program funds. This applies particularly to Secretarial representatives of USDA, DOC, USDI, DOL, and DOT—none of whom are line program administrators with loan and/or grant sign-off authority. Oaxaca letter, *supra* note 1.

[32] For example, the U.S. Army Corps of Engineers has served as an "associate voting member" of the Federal Regional Council in San Francisco. Telephone interview with Webster Otis, Chairman, Western Federal Regional Council, Feb. 17, 1976. Similarly, the chairperson of the Southern California Sub-Regional Council (SRC) acted as a nonvoting member of the San Francisco Council and was expected to attend FRC meetings regularly. Interview with Charles W. Grosh, secretary, Sub-Regional Council, in Los Angeles, Calif., Mar. 26, 1973.

[33] The Council chairperson shall invite additional agencies to participate in Council deliberations when a determination is made that the Council is considering matters significantly affecting the interests of such agencies. Exec. Order No. 11731, *supra* note 3.

[34] The New England Regional Commission (NERCOM) was established Mar. 20, 1967, pursuant to the Public Works and Economic Development Act of 1965, 42 U.S.C. §3181 (1970). Its major purposes are to develop long-range, economic development programs for the region, coordinate Federal and State economic development activities in New England, and promote increased private investment. Since 1973 NERCOM's priority programs have specifically included energy, transportation, and economic development. Policy guidance for the Commission is provided by the Secretary of Commerce, and it operates within the jurisdiction of the Commerce Department's Office of Regional Coordination. For further details see *New England Regional Commission, Annual Report: Fiscal Year 1974* (Jan. 31, 1975). See also the monthly newsletter, "News from NERCOM."

[35] The Federal cochairperson, appointed by the President, is one of seven members of NERCOM. Other members are the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Federal cochairperson acts as the principal contact between NERCOM and the Federal agencies and maintains offices both in Washington and Boston. See NERCOM pamphlet, "The New England Regional Commission: A Pragmatic Partnership" (undated).

[36] Exec. Order No. 11731, *supra* note 3. During fiscal year 1976 FRC chairmen in Boston and Dallas were the Secretarial Representatives for the Department of Transportation. In San Francisco the chairman was Special Assistant to the Secretary of the Interior, and in Chicago the chairman was the Regional Director for the Department of Health, Education, and Welfare. The term "chairman" is used, rather than a sex-neutral term such as "chairperson," because "chairman" is the title of this position as provided by Executive Order 11731.

[37] Federal Executive Boards (FEBs) are discussed in ch. 4 *infra*. Concerning the President's influence over FRC chairmen, OMB stated:

> The Chairman's agency still has control over their regional directors, and administrators. The President's designation reads "The designation is effective on [blank], and will terminate on [blank], or before that date if required by administrative consideration." The words *administrative consideration* allow individual agencies to replace, move to another location, promote to another job as Chairman without Presidential approval, even while Chairman. Oaxaca letter, *supra* note 1.

[38] Puritano interview, *supra* note 15.

[39] See Federal Regional Council, Region I (New England), *Handbook* 5 (Jan. 1, 1976) [hereinafter cited as *Handbook*]; Federal Regional Council, Region V (Chicago), *Internal Management Control* , §3 (August 1974); OMB, *FRC System Guidelines for FY 1974* 2-3 (Sept. 12, 1973) [hereinafter referred to as *FY 1974 FRC Guidelines*].

[40] See *id* . for a listing of members of the Under Secretaries Group see note 7 *supra* .

[41] These regions are listed in note 2 *supra* .

[42] In each regional city, every member agency is required to assign one

D. Council Staff Director

Each Council has a staff director charged with directing and supervising the work of the staff.[48] Appointed by the Council chairman from the chairman's agency,[49] the staff director is responsible for assisting with the Council agenda,[50] reviewing position papers and task force reports, and preparing the annual work plans and program reports which the Federal Regional Council submits to the Under Secretaries Group for review. The staff director is also responsible for handling communications with nonmembers.[51]

E. Council Committees and Task Forces

The bulk of Council work is performed by committees and task forces.[52] For example, during fiscal year 1976 most Regional Councils reviewed by the Commission maintained committees or task forces to assist in implementing OMB Circular No. A-95,[53] to strengthen the managerial and planning capacities of State and local governments, and to promote rural development. Generally, these bodies are placed under the direction of a "lead agency," that is, a permanent or ad hoc Council member who is selected by the members.[54] This lead agency directs the task force efforts and reports to the

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senior level staff member full time on Council matters. Council staff members are generally appointed from the staff of the agency they represent rather than from the outside. Salary, travel, and other expenses of secretariat members are paid by their parent agency. Typically the grade levels of these staff members range from GS 11-14. Royston interview, *supra* note 19; Strickler interview, *supra* note 22. The Boston FRC noted, however, that "Only half of the member agencies in fact now provide full time FRC staff positions. Agency staff committment often varies by region." Oaxaca letter, *supra* note 1.

[43] Oaxaca letter, *supra* note 1. The staff director's functions are discussed in sec. II(D) *infra*.

[44] *Handbook, supra* note 39, at 9-11.

[45] *Internal Management Control, supra* note 39, at §4.

[46] In commenting on the importance and difficulty of functioning in a dual role, a former staff director of the San Francisco FRC noted that, while it is necessary for staff members to present the justification for their agencies' viewpoints on an issue, they are also expected to work for the successful implementation of Council programs even though aspects of such programs may be at odds with the operating procedures of their agencies. The staff director made this observation on the basis of her personal experience as the FRC staff appointee from the Manpower Administration of the Department of Labor before she became staff director. Interview with Elaine Handy, Staff Director, Federal Regional Council, San Francisco, Mar. 21, 1973.

[47] These assignments may include, as an illustration, public presentations on the President's budget. See *FY 1976 FRC Guidelines, supra* note 12, at 4-5.

[48] It should be noted, however, "that the staff director has no more control over agency staff. . .[than] does the Chairman over other members." Oaxaca letter, *supra* note 1.

[49] The staff director's responsibilities are generally discussed in *Handbook, supra* note 39, at 9-10; Federal Regional Council, Region IX (Western), *Concepts and Operations* 6 (October 1972).

[50] Typically, the agendas for Council meetings are processed by the staff director and the secretariat under the guidance of the Council chairperson. Council members may propose agenda items to the chairperson directly or through their secretariat representatives. *Internal Management Control, supra* note 39; *Concepts and Operations, supra* note 49, at 7.

[51] *Handbook, supra* note 39, at 9.

[52] Basic distinctions between committees and task forces appear in many Federal Regional Councils. For example, committees and task forces may vary as to permanence, operations, and status depending upon the project. For example, in San Francisco a task force is a group usually formed to solve a short-term problem. Telephone interview with Robert Livingston, Staff Assistant to the Secretary of the Interior for Indian Affairs and Chairman of the Western FRC Committee on Indians, Feb. 10, 1976. The San Francisco FRC quoted its policy statement on committees:

> The Council. . .utilizes. . .Committees where there is a continuing responsibility to be exercised or a need to have an ongoing group to which recurring problems or requests can be referred. Such groups tend to have an indefinite life span. Section B of the San Francisco work plan for fiscal year 1976, as quoted in Oaxaca letter, *supra* note 1.

[53] 41 *Fed. Reg*. 202 (Jan. 13, 1976). OMB Circular A-95 is discussed in sec. IV(B) *infra*.

[54] On March 3, 1976, USG adopted a "lead agency concept." Under this concept, USG suggested that certain agencies act as "lead agencies" for some USG priorities. There are two important aspects to the process of designating "lead agencies." As OMB has noted:

> First, FRC Chairman determines the most appropriate approach for carrying out guidance. . .including but not limited to the use of a lead agency approach. Second, there was no plan to assign *all* USG priorities to lead agencies for development of policy guidance and support—this was intended to be a selective process.
>
> The guidance specifically indicates that the designation of lead agency on behalf of the USG should not be construed as a requirement that individual FRCs make identical agency assignments of responsibility for their own activities. Oaxaca letter, *supra* note 1.

See also memorandum from Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, to Under Secretaries Working Group, "Lead Agency Concept and Assignments," Dec. 16, 1975; telephone interview with William R. Feezle, Chief, Field Operations Branch, Division of Intergovernmental Relations and Regional Operations, OMB, Feb. 26, 1976.

secretariat or the Council.[55] Usually the Council secretariat will delegate one staff member as Council liaison to each task force.[56]

F. Under Secretaries Group for Regional Operations (USG)

The operating policies and procedures for each Federal Regional Council are broadly formulated and overseen by the Under Secretaries Group for Regional Operations,[57] which is composed of Washington-based, high level officials of the 11 member agencies of the Federal Regional Councils, as well as ad hoc representatives from the Department of the Treasury, the Civil Service Commission, the Energy Research and Development Administration, and the General Services Administration. The USG establishes national policy for Councils by suggesting work items, responding to Council initiatives, and attempting to resolve policy issues referred to it by the FRCs.[58] The Group is chaired by the Deputy Director of the Office of Management and Budget. The chairman presides over USG, presents and leads discussions on issues, and moderates other discussions.[59]

G. Under Secretaries Working Group (USWG)

The Under Secretaries Working Group (USWG) provides staff support to the Under Secretaries Group.[60] Its principal functions include developing agendas for USG meetings, reviewing Federal Regional Council programs, serving as a Washington forum for information exchange among member agencies, and ultimately making recommendations for decisions to the Under Secretaries Group.[61] Although members of the Under Secretaries Working Group have traditionally acted as liaison between the Councils and USG, this role has diminished since fiscal year 1974.[62] Working Group members usually may choose whether or not to develop such relationships.[63]

H. Office of Management and Budget Representatives

The Office of Management and Budget regularly assigns a nonvoting representative to each of the 10 FRCs.[64] This representative, who is the principal Washington-based participant at the Regional Council level, serves as a contact between OMB and the Council.[65] The major distinction between the liaison provided by USWG and OMB is that the former generally monitors activities by reviewing Council reports, without regular formal contact, while OMB representatives work more with practical and recurring Council problems through formal and regular interaction at the regional level.[66]

OMB representatives provide assistance to the Councils by interpreting OMB guidelines, advising the Council chairman, identifying possible improvements in interagency and intergovernmental coordination, and monitoring the implementation of major Presidential programs on the behalf of the OMB Director. They regularly attend Council meetings.[67] In short, OMB representatives play two important roles. First, they must seek to make the Federal Regional Council system more effective by expediting and facilitating solutions to intergovernmental and interagency problems. Second, they must monitor the extent to which the Councils are implementing the President's chief programs and priorities.[68]

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[55] For example, during fiscal year 1976 in the Southwest Region, the Department of Labor was the lead agency for a work item to improve the health, education, social services, and employment of migrants and seasonal farmworkers. *Southwest FY '76 Work Plan*, *supra* note 17, at 82.

[56] *Internal Management Control*, *supra* note 39, at §4.

[57] For further discussion of the Under Secretaries Group, see sec. II(G) *infra*.

[58] Exec. Order No. 11731, *supra* note 3, at 201.

[59] Oaxaca letter, *supra* note 1.

[60] The Under Secretaries Working Group is chaired by OMB's Deputy Associate Director for Intergovernmental and Regional Operations. Other members are selected by the Under Secretaries of FRC member agencies who serve on the Under Secretaries Group. During fiscal year 1975 the members of USWG devoted no more than 10 percent of their total work time to the activities of the Group. Royston interview, *supra* note 19. OMB stated, "The figure of 10% was given as a general estimate only. We recommend the reference be deleted since it provides no substantive information on the duties of the USWG." Oaxaca letter, *supra* note 1. OMB did not, however, deny that the estimate was essentially accurate. We are retaining this reference not because we believe it provides substantive information on the duties of the USWG, but because it indicates how much time is devoted to those duties.

[61] Interview with William R. Feezle, Chief, Field Operations Branch; Charles B. Hughes, Chief, Intergovernmental Relations Branch; and J. Paul Royston, Chief, Field Systems Branch, Division of Intergovernmental Relations and Regional Operations, OMB, Jan. 16, 1976; and memorandum from Frank C. Carlucci, Chairman, Under Secretaries Group for Regional Operations, "Under Secretaries Working Group Role and Procedures," May 10, 1972.

[62] Royston interview, *supra* note 19.

[63] *Id*. According to the Chief of OMB's Field Systems Branch, as of March 1976, liaison between USWG members and the Councils was informal and Working Group members did not necessarily work with the Councils in matters relating only to a member agency. *Id*.

[64] OMB representatives to the Councils are all staff members of the Intergovernmental Relations and Regional Operations Division, OMB.

[65] Interview with William R. Feezle, Chief, Field Operations Branch, Division of Intergovernmental Relations and Regional Operations, OMB, Jan. 8, 1976.

[66] Royston interview, *supra* note 19.

[67] Feezle interview, *supra* note 65.

[68] *Id*.

III. CIVIL RIGHTS ROLE OF THE COUNCILS

OMB explained the civil rights role of the Federal Regional Councils in the following terms:

> Each [FRC] is a committee mechanism for facilitating interagency cooperation and coordination and not another separate agency with authority or responsibilities of its own. Since the member agencies in the Councils constitute the major socio-economic program agencies of the Federal Government, and individually have responsibilities with regard to such civil rights enforcement activities as Federal Equal Employment Opportunity, Title VI, and Contract Compliance, many Council activities have related to interagency programs or projects which clearly focus on civil rights. The majority of Councils have made a concerted effort to change the delivery system of Federal services, especially as it pertains to migrants, Indians, and Spanish-speaking citizens. Federal Regional Councils do not have civil rights enforcement responsibilities nor authority to assure functions vested by law or assigned pursuant to law to any agency.[69]

Although Executive Orders 11647 and 11731 do not specifically direct the Federal Regional Councils to assume civil rights responsibilities,[70] they do direct the Councils to carry out at least two functions which relate to the Nation's civil rights laws and the coordination of Federal civil rights activities.

First, the Councils are instructed to coordinate the activities of member agencies,[71] and the implementation of Federal civil rights laws is an important and concurrent responsibility of all member agencies. For example, all member agencies have responsibilities under the following: Title VI of the Civil Rights Act of 1964, which requires nondiscrimination on the basis of race, color, or national origin in federally assisted programs;[72] Executive Order 11246, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin by Federal contractors and federally assisted construction contractors;[73] Title VII of the 1964 Civil Rights Act[74] and Executive Order 11478, which give each Federal agency responsibility for nondiscrimination on the basis of race, color, religion, sex, or national origin in its own employment practices;[75] and Title VIII of the Civil Rights Act of 1968,[76] which requires Federal agencies to administer their programs and activities relating to housing and urban development affirmatively to further fair housing.[77] Lack of coordination among Federal agencies has contributed to the ineffectiveness of Federal attempts to enforce these laws.[78] Interagency coordination by the Federal Regional Councils, as provided for in the Executive orders, could be of great benefit to the Federal civil rights enforcement effort.[79]

Second, the directive that FRCs develop "better ways to deliver benefits of Federal programs over the short term,"[80] ought clearly to be read as extending the Council's concerns to include the delivery of benefits to minorities and women.[81] There is ample evidence that discrimination against

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[69] Oaxaca letter, *supra* note 1. OMB also stated:

> We recommend that the report be more explicit in explaining whether an individual Council failed to act on perceived interagency or intergovernmental problems relating to civil rights within a region or whether the criticism is being levied at the national policymaking apparatus for FRCs in Washington for failing to direct some or all FRCs to address such issues.
>
> [OMB and t]he FRCs recommend that the Civil Rights Commission convey a clearer statement of their expectations of Federal Regional Councils as implementing agents of national policy directives on civil rights matters at the very onset of the [chapter]. Unless this is done, there will continue to be misunderstandings on the causes of deficiencies cited as well as the proposed solutions. *Id*.

This report attempts to assess the current and potential roles of the FRCs in the Federal effort to protect the rights of minorities and women. Where we have noted a deficiency, unless we have been explicit that the deficiency is an inadequacy in policy set at the Washington level, it is our view that generally action to remedy the deficiency could be initiated either by the Councils or by the Washington participants in the FRC system. Moreover, we would hope that both Washington and regional participants in the FRC system would ask themselves what actions they can take to implement Federal civil rights programs, rather than to treat as an obstacle to effective action what they may perceive to be lack of precision in this chapter. This Commission has not reorganized this chapter to place its statement of the civil rights role of the FRCs at the very onset of the chapter. It is our view that for the many readers of this report who will not initially be familiar with the nature of the FRCs, we must first describe the general responsibilities of FRCs (Section I, Program Responsibilities) and identify the roles of the people who make the FRCs function (Section II, Organization and Staffing.) Only after these two sections are presented do we believe that we have provided the necessary background for presenting our view of FRC civil rights responsibilities.

[70] See the eight functions of the Councils listed at sec. I *supra*.

[71] Exec. Orders 11647 and 11731, *supra* note 3.

[72] 42 U.S.C. §2000d (1970).

[73] Exec. Order No. 11246, 3 C.F.R., 1964–1965 Comp., p. 448.

[74] 42 U.S.C. §2000e (Supp. V, 1975).

[75] Exec. Order No. 11478, 3 C.F.R., 1969 Comp., p. 113.

[76] 42 U.S.C. §3601 *et seq.* (1970).

[77] 42 U.S.C. §3608(c)(1970).

[78] See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. II, To Provide. . .For Fair Housing* (December 1974); *Vol. V, To Eliminate Employment Discrimination* (July 1975); *and Vol. VI, To Extend Federal Financial Assistance* (November 1975).

[79] The potential role of the Councils in the enforcement of laws prohibiting discrimination in federally assisted programs is discussed in sec. IV *infra*. Their potential role in coordinating the enforcement of Federal equal employment opportunity law is discussed in sec. V *infra*.

[80] See Council functions listed in sec. I *supra*.

[81] OMB has stated, nonetheless, that:

> The list of basic functions for FRCs in EO 11731 was intended as a general framework of policy guidance rather than a list of mandatory activities. Individual agencies have their own responsibilities concerning enforcement of Title VI of the Civil Rights Act. Oaxaca

minorities and women in federally assisted programs is a serious impediment to the public's receipt of the benefits of these programs.[82] Without attention to the problems of minorities and women, the Councils will fall short of their goal to improve the delivery of benefits.[83]

Despite the civil rights responsibilities of the member agencies of the Federal Regional Councils and the appropriateness of civil rights activities for the full implementation of Executive Orders 11647 and 11741, as of late 1976, USG's guidelines assigned to the FRCs no explicit programs on a regular basis for securing the rights of minorities or women. A USG document of 1972 suggested that the Councils "periodically review the problems of. . .minorities and the disadvantaged."[84] It added that "numerous opportunities" for projects "may lie in programs for the Spanish-speaking, urban Indians, migrants, and juvenile delinquency prevention."[85] This document, however, is regarded as no longer operative by FRC officials.[86]

The fiscal year 1976 guidelines gave some slight formal encouragement for FRC attention to services provided to certain minority groups.[87] These guidelines suggested FRC involvement in providing assistance to Indian tribes on reservations and to migrant and seasonal farmworkers, most of whom are Spanish-speaking Americans.[88] The 1976 guidelines concerning American Indian tribes on reservations lacked specificity:

> Within the framework of FY 75 guidelines, FRCs are encouraged to continue their efforts to assist Indian Reservation Tribes. FRC initiatives should be closely coordinated with [the Departments of the Interior and Health, Education, and Welfare], in particular, in view of their responsibilities for Native American programs and policies regarding Federal relationships with Indian tribes. The recently passed Indian Self-Determination and Education Act will give additional flexibility to Council interagency coordination efforts and FRC work in improving the ability of tribes to manage their own affairs. Councils will be informed about the development of the new Indian Self-Determination Act as it is implemented by the Bureau of Indian Affairs.[89]

The reference to migrants and seasonal farmworker programs was even more cryptic:

> More specific FRC guidelines on rural development and migrant assistance are being prepared by USDA and DOL respectively for review by the USG in the near future. FRCs should anticipate continuing activities in support of these areas based upon such guidance.[90]

These guidelines were issued only after most FRC programs in these areas were already underway.[91] Moreover, the USG guidelines have not contained comparable suggestions for programs with regard to other minority groups or women, although their economic and social problems[92] could be addressed

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letter, *supra* note 1.

This Commission notes that the specific language in Executive Order No. 11731 is that the FRCs "shall. . .to the maximum extent feasible, assist State and local government by the coordination of the Federal program and grants operations through: (1) the development of better ways to deliver the benefits of Federal programs over the short term." Exec. Order No. 11731, *supra* note 3.

[82] *To Extend Federal Financial Assistance, supra* note 78.

[83] According to OMB:

> The FRCs. . .indicate that the Commission does demonstrate a lack of sensitivity as to why FRCs exist and that they attempt to bootstrap onto the FRCs a responsibility to solve complex issues where it is perceived that the Administration has not formulated adequate policy guidance. Oaxaca letter, *supra* note 1.

This Commission stands by its description of the civil rights role of the Federal Regional Councils.

[84] Memorandum from Frank Carlucci, Chairman, Under Secretaries Group for Regional Operations, to Federal Regional Council Members, "Implementation of Executive Order 11647," Mar. 10, 1972 [hereinafter referred to as Carlucci memorandum].

[85] *Id*.

[86] Feezle, Hughes, and Royston interview, *supra* note 61. The Chief of OMB's Field Operations Branch stated that the only operational guidelines for the Federal Regional Councils are those for fiscal years 1974, 1975, and 1976. See *FY 1976 FRC Guidelines, supra* note 12; *FY 1975 FRC Guidelines, supra* note 8; *FY 1974 FRC Guidelines, supra* note 39. According to another OMB official, the 1972 memorandum was superseded by the *FY 1974 FRC Guidelines*, since the guidelines for fiscal year 1974 were intended to be a later version of the 1972 memorandum. Royston interview, *supra* note 19. Nevertheless, OMB noted that "OMB guidelines are generally cumulative in nature. This means that specific guidelines remain in force, such as role of USG, USWG, Chairmen, issued in FY 74 and suggestions related to civil rights activities. . . ." Oaxaca letter, *supra* note 1.

[87] *FY 1976 FRC Guidelines, supra* note 12, at 8. Earlier guidelines contained no comparable suggestions. See *FY 1975 FRC Guidelines, supra* note 8 and *FY 1974 FRC Guidelines, supra* note 39. While no formal USG guidelines prior to fiscal year 1976 had suggested that the problems of migrants and Native Americans be addressed by the FRCs, there were informal but vague suggestions to this effect in fiscal years 1972 and 1975. See Carlucci memorandum, *supra* note 84; attachment to memorandum from Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, to Federal Regional Council Chairmen, "FRC Policy Issues for FY 1976," April 18, 1975, at 53 [hereinafter referred to as Puritano memorandum].

[88] See discussion at sec. VI *infra*.

[89] *FY 1976 FRC Guidelines, supra* note 12, at 8. The "framework" referred to in the FRC guidelines for fiscal year 1975 included descriptions of procedures to be used by each Council in preparing annual work plans and administrative guidance for resolving interagency conflicts and for meeting administrative costs. See *FY 1975 FRC Guidelines, supra* note 8.

[90] *FY 1976 FRC Guidelines, supra* note 12, at 8.

[91] For example, the Chicago and Southwest Councils had migrant projects as early as fiscal year 1973. See Federal Regional Council, Region V (Chicago), Annual Work Plan May 1, 1972, to May 1, 1973, 6a (1972) [hereinafter referred to as *Chicago FY '73 Annual Work Plan*]; Federal Regional Council, Region VI (Southwest), *Activity Plan for 1972–73* 10 (June 26, 1972) [hereinafter referred to as *Southwest FY '73 Work Plan*].

[92] Social and economic problems facing women are discussed in detail in

by coordinated grantmaking efforts of the member agencies.[93] Thus, as of June 1976 the Under Secretaries Group had yet to direct FRCs as a group to assume an active civil rights leadership role.[94]

The Office of Management and Budget also failed to encourage, through USG, the Federal Regional Councils as a group to engage in civil rights coordination.[95] This was primarily because OMB did not perceive its responsibilities to include assigning or encouraging a more active Council stance on civil rights or any other issues. According to the Associate Director for Management and Operations, the Office of Management and Budget assisted FRCs to implement policy, but civil rights implementation was clearly the ultimate responsibility of the individual agencies.[96]

This argument ignores the fact that the Office of Management and Budget possesses a great deal of influence over the Federal Regional Councils,[97] particularly in view of its responsibility for shaping the Federal budget, its role as leader of the Under Secretaries Group,[98] and its staff support to the FRCs. OMB possesses a general responsibility to identify civil rights issues through the budgetary process, to evaluate agency performance in the area of civil rights, and to assist the President in ensuring that the Nation's civil rights laws are enforced.[99] Moreover, at least two OMB directors have specifically instructed OMB staff to coordinate the civil rights activities of the Federal Regional Councils.[100]

The absence of any systematic stimulus to the FRCs from USG or OMB with respect to civil rights has meant that limited civil rights programs have often been developed as a result of the Councils' own initiatives.[101] Indeed, Council officials have acknowledged the potential civil rights role of the Councils.[102] Further, the work plans and annual reports of the Councils have recognized the fact that Executive Orders 11647 and 11731 provide a mandate for civil rights activity.

The Councils' recognition of their civil rights responsibilities dates back several years. In fiscal year 1973, the New England Council listed five of the eight FRC functions as impetus for its Spanish-speaking activities[103] and four functions as supporting its equal employment opportunity program.[104] For fiscal year 1972, the Chicago FRC's annual report acknowledged that its Spanish-speaking task force was operating under the authority of three

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U.S. Commission on Civil Rights, *Women in Poverty* (June 1974). For related problems of blacks and Americans of Spanish origin see, e.g., U.S. Commission on Civil Rights, *Twenty Years After Brown: Equality in Economic Opportunity* (July 1975) [hereinafter referred to as *Equality in Economic Opportunity*]; U.S. Commission on Civil Rights, *The Mexican American* (1968).

[93] OMB has commented that there is an exception to this statement:

> The Commission's assessment of FRC and USG initiatives on civil rights related matters failed to mention the significant efforts by the Dallas and Atlanta Federal Regional Councils from 1970–1972 to assist displaced black educators in obtaining employment. This effort was launched under the auspices of the Cabinet Committee on School Desegregation and was actively supported by the USG and OMB. Oaxaca letter, *supra* note 1.

[94] OMB has noted that "The USG has directed in specific instances that FRCs assume an active role in civil rights. The FY 77 guidance indicates a role for civil rights, affirmative action and we are currently issuing lead agency guidance on this subject." *Id*.

[95] OMB disagrees with this basic conclusion. It has stated:

> . . .As the Commission's report clearly indicates, civil rights embraces a wide variety of initiatives aimed at assisting racial minorities, the economically disadvantaged, women and other groups who have suffered discrimination. In that broader context, the FRCs have undertaken numerous programs over the years to assist these groups both at their own initiative as well as at the direction of the Under Secretaries Group. Even the most cursory reading of proposed FRC Work Plans over the past few years would reveal a substantial investment of resources in assisting the disadvantaged including resettlement of Vietnam Refugees, improving coordination of migrant programs, and assistance to Indian tribal governments in securing Federal grants through the joint funding process. *Id*.

[96] Oaxaca interview, *supra* note 6. In a 1975 memorandum, this OMB official further explained the OMB-FRC relationship in the following terms:

> [T]he Office of Management and Budget has no direct statutory authority or supervisory responsibility with respect to individual Federal agencies or their employees which are represented on the FRCs and FEBs; but rather a responsibility for developing general guidance in consultation with the appropriate agency heads to promote improved economy, efficiency, and substantive effectiveness of the Federal Government through the cooperative efforts of Federal field officials. Memorandum from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to the Chairman of the Boston Federal Regional Council and the Chairman of the Boston Federal Executive Board, Sept. 25, 1975 [hereinafter referred to as Oaxaca memorandum].

OMB reiterated this description after reviewing this report in draft form, adding that "individual agencies have their own responsibility concerning enforcement of Title VI of the Civil Rights Act." Oaxaca letter, *supra* note 1.

[97] Feezle, Hughes, and Royston interview, *supra* note 61.

[98] See Exec. Order No. 11731, *supra* note 3, at 200.

[99] Memorandum No. 75–54, from James T. Lynn, Director, OMB, to OMB staff, May 16, 1975, at 1. This memorandum outlines OMB's civil rights responsibilities in connection with Federal financial assistance, contract compliance, equal employment opportunities within the Federal Government, fair housing and site selection, minority procurement, and the strengthening of minority-owned bank deposits.

[100] Memorandum No. 74–12, from Roy L. Ash, Director, OMB, to OMB staff, "Civil Rights Activities," July 26, 1973; Memorandum No. 71–53 from George P. Schultz, Director, OMB, to OMB Assistant Directors and Division Chiefs, "Civil Rights Issues in the Budget Hearing Process," Oct. 30, 1970.

[101] According to one OMB official, individual Councils have generally taken the initiative to develop their own civil rights projects, and the Under Secretaries Group subsequently included migrant and Native American elements in the 1976 USG guidelines. Royston interview, *supra* note 19. See also Strickler interview, *supra* note 22.

[102] Telephone interviews with Ed Foreman, Chairman, Southwest Federal Regional Council, Feb. 10, 1976; Otis interview, *supra* note 32.

[103] Federal Regional Council, Region I (New England), *1972-1973 Activity Plan* Spanish-speaking work item (1972) [hereinafter referred to as *New England FY '73 Activity Plan*]. The functions were 1, 3, 4, 5, and 8, as listed in sec. I *supra*.

[104] *New England FY '73 Activity Plan*, *supra* note 103, at the equal employment opportunity work item. The functions mentioned were numbers 1, 4, 5, and 8, as listed in sec. I *supra*.

FRC functions spelled out in Executive Order 11731.[105] For fiscal year 1974, Council functions were similarly cited as mandating two Native American programs initiated by the Southwest Council.[106]

The Federal Regional Councils have recognized the need to become involved in other civil rights issues. One example of this occurred in 1975 during Boston's public school desegregation effort. As of June 1975, in the face of mounting desegregation problems in Boston, the New England Federal Regional Council had not developed plans to coordinate Federal grants and other resources to address the special needs of Boston public schools.[107] Subsequently, this Commission found that the FRC had not been "utilized to facilitate school desegregation in a meaningful manner,"[108] and recommended that the Director of OMB instruct the New England FRC to assist in providing "the maximum possible support for school desegregation in Boston."[109] OMB then issued instructions to the Council,[110] which subsequently worked on this issue with the Boston Federal Executive Board[111] and the Department of Health, Education, and Welfare.[112] The Council also held meetings to inform member Federal agencies concerning Boston desegregation activities and to discuss plans through which Federal employees could assist in monitoring desegregation in Boston.[113]

The Cairo task force in Region V is another example of a Council's civil rights effort.[114] This task force was created in December 1969 to assist the Governor of Illinois with problems underlying racial strife in Cairo, Illinois, and to coordinate Federal services flowing to Cairo inhabitants.[115] However, the task force was considered a "low level priority"[116] by the Chicago FRC and appears to have accomplished virtually nothing. Five years after its creation and nearly 3 years after this Commission's hearings[117] and reports[118] on Cairo, there had been little Federal followup to Commission recommendations.[119]

Generally speaking, the Federal Regional Councils have recognized some of their civil rights responsibilities, but they have devoted insufficient time to the problems of blacks, women, and Asian Americans.[120] Although the FRCs have maintained programs for Native Americans and persons of Spanish origin, these programs have often been of only minor consequence.[121]

IV. THE GRANTMAKING PROCESS

Myriad problems have emerged in the delivery of Federal programs to minorities and women which are impediments to their receiving an equitable share of benefits from expenditure of Federal funds.[122] State employment security agencies,[123] for example, have sometimes failed to give minorities equitable credit for their education, skills, and experience when assigning occupational classifications.[124] These agencies also have entered extraneous and subjective comments on application forms concerning applicants' family history and appearance which may have led to decreased employment opportunities for minorities and women.[125] Moreover, these State employment agencies have discriminated against minorities and women in referrals by directing them to lower paid employment, traditionally reserved for minorities and women.[126]

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[105] Federal Regional Council, Region V (Chicago), *Annual Report March '73* 21 (Mar. 30, 1973) [hereinafter referred to as *Chicago FY '72 Annual Report*]. The functions were 3 and 6, as listed in sec. I *supra*.

[106] Federal Regional Council, Region VI (Southwest), *Activity Plan FY 1973-74* 58 (Apr. 17, 1973) [hereinafter referred to as *Southwest FY '74 Activity Plan*]. The functions were 3 and 6, as listed in sec. I *supra*.

[107] Testimony of David Hays, Chairman, New England Federal Regional Council, transcript of hearing before the U.S. Commission on Civil Rights, June 19, 1975, Boston, Mass., June 19, 1975, at 1154.

[108] U.S. Commission on Civil Rights, *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* 212 (August 1975).

[109] *Id.* at 214-15.

[110] Oaxaca memorandum, *supra* note 96.

[111] The Boston FEB's role in the Boston desegregation effort is discussed in ch. 4 *infra*.

[112] Telephone interview with Maureen E. Strickler, Staff Director, New England Federal Regional Council, Jan. 30, 1976. The staff director explained that the Council largely deferred to the Boston FEB to take action on the city's desegregation problems, and in the fall of 1975 the FRC detailed one staff liaison person to assist the FEB in its desegregation efforts.

[113] Strickler interview, *supra* note 112.

[114] Federal Regional Council, Region V (Chicago), *Annual Work Plan May 1, 1972 to May 1, 1973*, 18 (1972) [hereinafter referred to as *Chicago FY '73 Work Plan*]; Federal Regional Council, Region V (Chicago), *Report of the Interagency Task Force in Cairo* (August 1971). This task force seems to provide another illustration of an FRC activity unique to one region, initiated by a Council without formal USG guidance. See the discussion in sec. I *supra*.

[115] *Chicago FY '73 Work Plan*, *supra* note 114, at 18.

[116] The task force continued to linger for a few years with much of its time devoted to assessing the hearings and reports of this Commission. *Id.*

[117] In the Spring of 1972, after the outward manifestations of racial hostility in Cairo had generally abated, the U.S. Commission on Civil Rights held a 3-day public hearing "to look at the underlying causes of the racial strife and to determine what could be done to resolve the city's problems." *Hearings Before the U.S. Commission on Civil Rights on Cairo, Illinois, March 23-25, 1972* [hereinafter referred to as *Hearings Before the U.S. Commission on Civil Rights, Cairo, Illinois*].

[118] See, e.g., U.S. Commission on Civil Rights, *Cairo, Illinois: A Symbol of Racial Polarization* (February 1973) [hereinafter referred to as *Cairo, Illinois: A Symbol of Racial Polarization*]; U.S. Commission on Civil Rights, *Cairo, Illinois: Racism at Floodtide* (October 1973).

[119] Based on the Cairo hearings, this Commission made a number of recommendations on law enforcement, education, housing, employment, and health care. For example, the Commission recommended that HUD require the Alexander County Housing Authority to comply immediately with fair housing laws and regulations. *Cairo, Illinois: A Symbol of Racial Polarization*, preface.

This Commission received many acknowledgments from Federal agencies that received the Cairo reports, and most agencies attempted to demonstrate that their programs in Cairo were adequate, despite the fact that the poor conditions in Cairo continued. For the most part, agencies did not commit themselves to take prompt and strong action to alleviate these conditions.

[120] An examination of the work plans and annual reports listed in note 17 *supra*, reveals no Council activities specifically for Asian Americans. The best example of an FRC program oriented toward the status of women involved Federal employment. See discussion at sec. V(C) *infra*. Unfortunately, that task force had little success and disintegrated in 1975 when its members objected to relinquishing the group's autonomy to become a component of one uniform equal employment program supported by the Council. Telephone interviews with LeRoyal King, Director, Chicago Federal Regional Council, External Equal Employment Opportunity Task Force, Feb. 2, 1976; and Liz Newsome, Community Services Administration, staff liaison to Chicago FRC, Feb. 2, 1976.

[121] See discussion of FRC Spanish-speaking programs at sec. VI *infra* and the discussion of FRC Native American programs at sec. VII *infra*.

Public transportation is another area in which minorities, and possibly women, have been denied the full benefits of federally funded programs. For example, inner cities have received less adequate urban transportation services than white suburbs.[127] Additionally, those inner city transportation services have at times been more irregular and usually inferior to those of suburban communities.[128]

Minorities and women have also experienced discrimination in the law enforcement system. Minority neighborhoods have received less adequate police protection than other neighborhoods,[129] and minorities have frequently encountered discourteous treatment or harassing actions from the police.[130] Moreover, both grand and petit juries often have had few minority members,[131] and imprisoned minorities have received a disproportionately low number of benefits from prison work release, vocational, and educational programs.[132] In a similar vein, law enforcement officials have been reluctant to enforce the law fully where women have experienced marital violence,[133] and in prostitution cases female prostitutes have been arrested when their male customers have not.[134] Further, women have received less than an equal opportunity to serve on juries.[135] Both women and minorities have also been denied equal employment opportunities in law enforcement agencies[136] and correctional facilities.[137]

In view of their responsibilities as explained in Executive Orders 11647 and 11731, the Federal Regional Councils could provide a forum for bringing about remedies to some of these problems. First, and perhaps most important, these Executive orders direct the Councils to develop better ways for delivering Federal program benefits.[138] Clearly, the improvement of services to these groups must be a significant component of any successful effort to improve generally the delivery of Federal program benefits.

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[122] See generally *To Extend Federal Financial Assistance*, *supra* note 78.

[123] State employment security agencies receive financial and technical assistance from the Manpower Administration of the Department of Labor under the Wagner-Peyser National Employment System Act of 1933, 29 U.S.C. §§49–49c, 49d, 49g, 49h, 49j, 49k, 557 (1970).

[124] This has been noted, for example, in 1972 in the Manpower Administration's compliance reviews of the Clovis, N.M., and Forrest City, Ark., employment security offices.

[125] See, e.g., compliance reviews of employment security offices by the Manpower Administration, Dallas Regional Office, Forrest City, Ark., October 1972; Manpower Administration and Connecticut Employment Security Division, joint compliance review, 1971.

[126] This problem is discussed in *To Extend Federal Financial Assistance*, *supra* note 78, at 444–65. This Commission concluded that as of April 1975, the Department of Labor had not determined if compliance had been achieved in several State employment services found in 1972 not to be adhering to Title VI. *Id.* Nevertheless, the San Francisco FRC, through OMB, stated: "The reference. . . to the discrimination of State employment agencies found in the late [1960's] and early 1970's may not be valid today. DOL has taken significant steps to deal with the issue." Oaxaca letter, *supra* note 1. This Commission notes that all of the references referred to the early and mid 1970s.

[127] See, *Hearing Before the United States Commission on Civil Rights, Washington, D.C.*, June 14–17, 1971; *Hearing Before the United States Commission on Civil Rights, St. Louis, Missouri*, Jan. 14–17, 1970.

[128] Letter from William T. Coleman, Jr., Secretary of Transportation, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 14, 1975. The examples in this section are given to illustrate the types of discrimination which can occur in federally funded programs, as a prelude to our discussion of the potential role of FRCs in combating discrimination in federally assisted programs. OMB stated: "In the public transportation discussion, the way approached does not seem to relate to the FRC system. No specific points." Oaxaca letter, *supra* note 1.

[129] See U.S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* 12-13 (1970) [hereinafter referred to as *Mexican Americans and the Administration of Justice in the Southwest*], and Wisconsin Advisory Committee to the U.S. Commission on Civil Rights, *Police Isolation and Community Response* (December 1972).

[130] *Id.*; *Hearing Before the United States Commission on Civil Rights, Cairo, Illinois*, *supra* note 117, at 41; and Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, *Police-Community Relations in Philadelphia* (June 1972).

[131] *Mexican Americans and the Administration of Justice in the Southwest*, *supra* note 129, at 36–46. See generally, Kuhn, "Jury Discrimination: The Next Phrase," 41 *S. Cal. L. Rev.* 235 (1968).

[132] Alabama Advisory Committee to the U.S. Commission on Civil Rights, *Alabama Prisons* (1975) [hereinafter referred to as *Alabama Prisons*]; Kansas Advisory Committee to the U.S. Commission on Civil Rights, *Inmate Rights and the Kansas State Prison System* (1974). Concerning women, see also Colorado Advisory Committee to the U.S. Commission on Civil Rights, *Colorado Prison Study* 126 (1974).

[133] Truniger, "Marital Violence: the Legal Solutions," 23 *Hastings L.J.* 259 (1971). See generally, S. Steinmetz and M. Straus, *Violence in the Family*, ch. 2 (1974).

[134] See, e.g., United States v. Wilson, Criminal No. 69760–73 (Super. Ct. D.C., Mar. 14, 1974), distinguished in United States v. Dinkins, Criminal No. 52179–74, (Super. Ct. D.C., Oct. 4, 1974).

[135] Taylor v. Louisiana, 419 U.S. 522 (1975). A survey of the exclusion of women from juries is found in Johnson and Knapps, "Sex Discrimination by Law: A Study of Judicial Perspective," 46 *N.Y. U. L. Rev.* 675, 708–21 (1971).

[136] See Egerton, "A National Survey, Minority Policemen: How Many Are There?" 5 *Race Rel. Rep.* 19 (1974); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government: United States Summary, Vol. I* 49 (1973).

[137] *Alabama Prisons*, *supra* note 132; and Arizona State Advisory Committee to U.S. Commission on Civil Rights, *Adult Corrections in Arizona* (1974); Georgia Advisory Committee to the U.S. Commission on Civil Rights, *Georgia Prisons* (1976).

[138] See function 1 of Exec. Order No. 11731 as quoted in sec. I *supra*.

Second, the Executive orders direct the Councils to improve the means of distributing Federal funds to meet State and local long-term needs. Given current trends,[139] State and local communities for many years will have to meet special needs of minorities and women in such areas as employment, transportation, and law enforcement.

There are at least two prominent avenues[140] through which the Federal Regional Councils could meet these responsibilities for improving the delivery of Federal assistance to minorities and women while helping to ease past injustices: (1) fostering interagency coordination of civil rights compliance in federally assisted programs and (2) ensuring that the rights of minorities and women are included in the State and local government review of proposed federally funded projects.

A. Interagency Coordination of Civil Rights Compliance in Federally Assisted Programs

A number of civil rights laws and regulations prohibit discrimination in federally assisted programs. Foremost among these laws is Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin.[141] In addition, discrimination is prohibited in a number of federally assisted programs by the legislation which established them.[142]

There are approximately 400 federally assisted programs,[143] which account for roughly $50 billion in expenditures each year. Twenty-seven agencies administer such programs, and each is responsible for enforcing the laws requiring nondiscrimination in the programs it administers.[144]

Coordination among these agencies is essential. In 1975 this Commission noted:

> [A]bsent effective coordination and direction, Title VI agencies may make inconsistent interpretations of law or develop conflicting standards for implementation of Title VI, such as data collection requirements. Since some recipients are assisted by a number of Federal agencies, it is important that these recipients not be subjected to varying and possibly conflicting information reporting requirements and compliance standards. Similarly, even where there is uniformity among the agencies, it is important that such recipients not be subjected to duplicative compliance reviews, audits, and other investigations by the different agencies.
>
> Equally serious, however, is the situation created whenever some agencies enforce the law vigorously and others do not. An uneven level of enforcement activity among the agencies encourages a nonresponsive attitude by recipients towards those who would enforce the law. This, in turn, can demoralize members of staffs who are desirous of achieving effective enforcement. In this way, inconsistency of enforcement

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[139] *To Extend Federal Financial Assistance, supra* note 78.

[140] A third avenue is through the Integrated Grant Administration (IGA) programs of the Federal Regional Councils. The main objectives of IGA are "to establish one set of administrative requirements to be followed by all Federal agencies in supporting jointly funded projects and to encourage the simplification and standardization of various agency administrative requirements for such projects." 40 *Fed. Reg.* 59555 (1975). IGA programs are developed pursuant to the Joint Funding Simplification Act of 1974, 42 U.S.C. §§4251–4261 (Supp. V, 1975). FRC-sponsored IGA programs have existed since January 1972. See General Services Administration, *Integrated Grant Administration Assessment Report* iv (April 1975). Typically, these programs have attempted to minimize duplication of effort and overlap among Federal grantmaking agencies where one grant application is possible. In other words, a potential grantee can, under the IGA concept, apply for and receive Federal funds from more than one Federal agency by making a single application. Through this process the FRCs have simplified the delivery of Federal services to a broad range of governmental units—from councils of governments and cities to State governments. See, e.g., *New England FY '76 Work Program, supra* note 16, at 20–21; *Chicago FY '76 Work Plan, supra* note 17, at 7–10. *Southwest FY '76 Work Plan, supra* note 16, at 99–101; *Western FY '76 Work Plan, supra* note 17, at 13, 18–20, 23. For example, the Chicago FRC is currently involved in IGA programs with Milwaukee, Wis., and Indianapolis, Ind., as well as with bi-State and metropolitan planning agencies. Similarly, the Western FRC has established IGA programs with Arizona and California agencies. Through such programs, the Councils have at times recognized that IGA is one effective mechanism for improving the delivery of services to minority groups. In the Western region, for example, the FRC has worked with the Salt River Pima-Maricopa Indian community to simplify applications and processing for Federal grants. *Western FY '76 Work Plan, supra* note 17, at 13.

[141] Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Section 601, Civil Rights Act of 1964, 42 U.S.C. §2000d (1970).

For details on Title VI enforcement see *To Extend Federal Financial Assistance, supra* note 78. For an earlier treatment see Comment, "Title VI of the Civil Rights Act of 1964—Implementation and Impact," 36 *Geo. Wash. L. Rev.* 824 (1968).

[142] For example, discrimination on the basis of race, color, national origin, or sex is prohibited in programs receiving general revenue sharing funds (31 U.S.C. §1243(a)(7) (Supp. V, 1975)); programs receiving LEAA funds under the Omnibus Crime Control and Safe Streets Act as amended (42 U.S.C §3701, *et seq.* (Supp. V, 1975)); and the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. §5601, *et seq.* (Supp. V, 1975)). Sex discrimination is prohibited in EPA funded programs by the Federal Water Pollution Control Amendments of 1972 (33 U.S.C. §1251 note (Supp. V, 1975)).

[143] *Hearings on the Departments of State, Justice, and Commerce, the Judiciary and Related Agencies, Appropriations for 1973,* Before a Subcom. of the House Comm. on Appropriations, 92d Cong., 2d. Sess., pt. 1, at 656.

[144] If a Federal agency uncovers discrimination in a program it funds and the recipient does not voluntarily correct the discrimination, the agency must either terminate the assistance or refer the matter to the Department of Justice for civil action. 42 U.S.C. §2000d–1 (1970). See also 28 C.F.R. §50.3 (1974). Other legislation prohibiting discrimination in federally assisted programs often contains the same provisions for sanctions; see, for example, the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1242(b) (Supp. V, 1975) and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§921 *et seq.*, and 1201.

effort undermines the Government's entire Title VI effort.[145]

Nonetheless, civil rights coordination among agencies administering assistance programs has been poor. Coordination of Title VI enforcement rests with the Federal Programs Section of the Department of Justice's Civil Rights Division.[146] The Justice Department's coordination of Title VI has been inadequate.[147] Moreover, there is no Government-wide coordination mechanism for other civil rights requirements in federally assisted programs.

In the absence of coordination, Federal agencies have often duplicated efforts without exchanging information concerning their overlapping compliance programs.[148] Consequently, they sometimes present inconsistent views to Federal recipients as a result of incompatible findings or recommendations.[149] For example, metropolitan planning agencies[150] have been subject to several compliance reviews by different Federal agencies within short periods of time,[151] and Federal agencies have even been known to arrive on the same day for a review with no advance knowledge of the other agency's plans.[152] One planning official has estimated that the vast majority of metropolitan planning agencies have experienced these problems.[153]

Overlapping financial assistance provided by different Federal agencies in a wide variety of areas has been a major contributor to coordination problems. The Department of Agriculture (USDA), for example, has experienced a lack of coordination in school lunch, nursing home, food stamp, and summer camp programs where the Department of Health, Education, and Welfare (HEW) has also furnished assistance to these recipients.[154] The Community Services Administration (CSA) has similarly discovered a lack of coordination with HEW in the funding of community action agencies,[155] which has led to an attempt by CSA and HEW to conduct joint compliance reviews under some circumstances.[156] However, compliance reviews by different Federal agencies may result in quite different findings as to employment discrimination.[157]

Clearly, coordination of enforcement activities falls within the scope of the Councils' duties to develop procedures for improving interagency and intergovernmental cooperation and for resolving interagency problems and conflicts.[158] Indeed, in areas other than civil rights, the FRCs have promoted related governmental coordination activities in a number of ways. They have acted as a forum for information sharing;[159] they have published newsletters;[160] and they have sponsored various types of training.[161] Similar activities could also be planned to reduce duplication and conflict in the compliance review process.

Specifically, the Councils could, for example, provide a forum for ensuring identification of overlapping compliance responsibilities, for cooperating in the timing of compliance reviews, and for scheduling joint compliance reviews and complaint investigations where appropriate. Through committees or task forces, the Councils could undertake such activities as promoting the sharing of data and maps depicting concentration of minorities within metropolitan areas, maintaining information on previous compliance reviews, publishing a periodic newsletter on member agency compliance activities, and sponsoring workshops or training sessions where Council members could share information and discuss compliance techniques. The Councils could work cooperatively in developing community profiles for purposes of targeting recipients for compliance reviews and for requiring affirmative action programs. Such profiles could provide general information describing communities, their minority composition, housing patterns, and educational systems.[162]

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[145] *To Extend Federal Financial Assistance, supra* note 78, at 647-48.

[146] See Exec. Order No. 11764, "Nondiscrimination in Federally Assisted Programs," Jan. 21, 1974, 39 *Fed. Reg.* 2575 (January 1974), 42 U.S.C. §2000d-1

[147] *To Extend Federal Financial Assistance, supra* note 78 at ch. 9 and pp. 798-803. Exec. Order No. 11764 directs the Attorney General to develop and promulgate Title VI standards, and draft standards have been prepared. Exec. Order No. 11764, *supra* note 146. As of March 1976, however, the Attorney General had failed to issue them, leaving all other Federal agencies with insufficient direction.

[148] Telephone interviews with Stephen Appell, Coordinator, Federal Programs Section, Civil Rights Division, Department of Justice, Mar. 17, 1976; Betty Lou Dotson, Assistant Director for Equal Opportunity, ACTION, Mar. 18, 1976; Carlos A. Ruiz, Associate Director for Human Rights, Community Services Administration, Mar. 18, 1976.

[149] Ruiz interview, *supra* note 148.

[150] A metropolitan or regional planning agency is a public agency, usually established on a multijurisdictional basis to plan for the development of a geographical area equal in size to, or larger than, a Standard Metropolitan Statistical Area. J. Bollens & H. Schmandt, *The Metropolis* 295-97 (1965).

[151] Telephone interview with Richard C. Hartman, Executive Director, National Association of Regional Councils, Mar. 17, 1976.

[152] Telephone interview with Peter Levy, Deputy Director, Mid-American Regional Council, Kansas City, Mo., Mar. 17, 1976.

[153] *Id*.

[154] Dotson interview, *supra* note 148. In this regard, Ms. Dotson was speaking from her experience as the former Director, Office of Civil Rights, Food and Nutrition Service, Department of Agriculture. Also telephone interview with Christopher Greene, equal opportunity specialist, Federal Programs Section, Civil Rights Division, Department of Justice, Mar. 17, 1976.

[155] Ruiz interview, *supra* note 148; Appell interview, *supra* note 148.

[156] See letter from Carlos A. Ruiz, Associate Director, Office of Human Rights, Community Services Administration, to James L. Robinson, Director, Project Head Start, Department of Health, Education, and Welfare; Feb. 20, 1976; and letter from James L. Robinson to Carlos A. Ruiz, Mar. 10, 1976. For example, HEW and CSA were, as of March 1976, seeking to conduct joint compliance reviews of a community action agency in Ogden, Utah. Ruiz interview, *supra* note 148.

[157] *Id*.; and Appell interview, *supra* note 148.

[158] See functions 4 and 8 of Exec. Order No. 11731 as listed in sec. I *supra*.

[159] See, for example, the environmental data sharing system, discussed in *Western FY '76 Work Plan, supra* note 17, at 27.

[160] See, for example, Federal Regional Council, Region V (Chicago), *Annual Report FY 1974* 30 (1974) [hereinafter referred to as *Chicago FY '74 Annual Report*].

[161] See, for example, the discussion in sec. V(C) *infra* of training sponsored by the New England Council.

Similarly, the Councils could act as mechanisms for identifying inconsistencies among member agencies' programs, resolving these disagreements among member agencies at the regional level, and seeking resolution of policy disagreements by forwarding them to the Under Secretaries Group and the headquarters of member agencies.[163] Although the Councils could assist in providing these coordinative activities for Title VI compliance, it appears from FRC work plans and annual reports[164] that at the time of this Commission's review they had not undertaken such activities.[165]

B. The A-95 Process

OMB Circular No. A-95 is designed to promote intergovernmental cooperation by allowing State and local officials to review and comment on the extent to which proposed Federal programs are consistent with ongoing or planned programs of those State and local governmental units.[166] This review process requires that prospective applicants for Federal funds notify clearinghouses within the States, so that State and local agencies may comment on the proposed projects.[167] If within 30 days the clearinghouse chooses to review the application, it then has another 30 days to collect the comments of concerned State and local agencies.[168]

Circular No. A-95 has as one of its purposes to further the objectives of the 1964 Civil Rights Act[169] and to provide an opportunity to State and local civil rights agencies to review and comment on proposed projects.[170] Such comments may relate, for example, to whether the proposed projects promote "more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups."[171]

The Federal Regional Councils have been assigned the responsibility of coordinating OMB Circular A-95 activities within their respective regions,[172] specifically for disseminating information on A-95, handling complaints of noncompliance with the circular, and communicating with OMB on the status of A-95 implementation within the region.[173]

After reviewing this section on OMB Circular A-95, OMB wrote to this Commission, further describing the A-95 process:

> The primary objective of the laws which A-95 was designed to implement (Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968) is to assure the coordination of Federal and

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[162] The type of coordination that should be undertaken by the Councils should be distinguished from the responsibilities of the Department of Justice under Executive Order 11764 for coordinating and directing Federal agency Title VI programs. The Department of Justice should establish uniform time frames for conducting compliance reviews, negotiating voluntary compliance, and taking enforcement actions. It should set standards for compliance activity, making clear, for example, what actions a Federal agency must take to ensure that it has attempted to bring its recipients into voluntary compliance, when enforcement action is necessary, and what data recipients must collect and maintain for demonstrating Title VI compliance.

[163] Similar activities would also be appropriate under other civil rights authorities. For example, Title VIII of the Civil Rights Act of 1968 directs Executive departments and agencies to cooperate with the Secretary of the Department of Housing and Urban Development in assuring fair housing. 42 U.S.C. §3601 *et seq.* (1970). The Federal Regional Councils could provide a forum for HUD coordination and guidance. The Councils' potential role in coordinating equal employment opportunity is discussed in sec. V *infra* .

[164] See work plans and annual reports listed in notes 16 and 17 *supra* .

[165] OMB stated:

> The Boston FRC indicated that with the development of block grants and pass through funding, the direct implementation and monitoring of civil rights provisions have increasingly become a State and local role. Given this situation, the FRC would welcome a clearer definition of its responsibility and authority to directly oversee civil rights requirements. Oaxaca letter, *supra* note 1.

Although State and local governments have recently gained some civil rights responsibilities with regard to federally aided programs, the Federal Government has not abdicated its responsibility to ensure nondiscrimination in such programs. The development of special revenue sharing programs does not alter our view that it can be advantageous to Federal agencies to coordinate with one another their regional civil rights efforts. This chapter does not, however, discuss a civil rights role for the FRCs under general revenue sharing or antirecession fiscal assistance. Both of these programs are adminstered by the Department Of the Treasury, which is not an official member of the FRC system.

[166] OMB Circular No. A-95 (Revised), "Evaluation Review and Coordination of Federal and Federally Assisted Programs and Projects," 41 *Fed. Reg.* 2052 (Jan. 13, 1976) [hereinafter referred to as Circular A-95 (Revised)]. For details see the discussion of OMB Circular No. A-95, ch. 2 *supra* . OMB oversees the A-95 process and helps Federal agencies to develop implementation procedures and regulations.

[167] Circular A-95 (Revised), *supra* note 166, Part I(2)(a) and (b).

[168] *Id* ., Part I(4)(a)-(c).

[169] *Id* ., (d) at 2052.

[170] *Id* ., Attachment A, Part I (3)(e), at 2053.

[171] *Id* ., Part I (5)(h). Although women are disregarded under Circular A-95, there is no reason for this omission in view of laws which prohibit sex discrimination in federally assisted programs. See ch. 2 *supra* .

[172] *Id* ., §15 at 2052.

[173] Memorandum from Roy L. Ash, Director, OMB, to Federal Regional Council Chairmen, "OMB Circular A-95: Field Implementation," June 25, 1974, [hereinafter referred to as Ash memorandum].

> federally assisted programs and projects with State, areawide, and local plans and programs.
>
> The primary mission of the Federal Regional Councils in coordinating the implementation of the Circular is to assure that Federal agencies at the regional level are in compliance with its requirements. Central to this is assurance that State and areawide clearinghouses—and through them, State agencies and local governments and agencies (including civil rights agencies)—are given the opportunity to review applications for Federal assistance for their relationship to the plans and programs of these governments and agencies. Each will approach a given application from the point of view of its own interests and missions.
>
> It is not the function of the FRCs to instruct clearinghouses or the governments, agencies, or other groups to which they might refer applications for review on the subject matter of their comments. It is not necessary, as each knows those kinds of projects or aspects of projects in which it is interested.
>
> There are three obligatory referrals the clearinghouses must make: to chief executives of units of general local government (on request), to civil rights agencies, and to environmental agencies. OMB has received no complaints about any clearinghouses refusing to make such referrals. If the Commission is aware of such delinquency with respect to State and local civil rights agencies, then we feel that the Commission has a responsibility to call the specific instances to the attention of OMB or the appropriate FRC so they can remind the offending clearinghouse of its obligations.
>
> A-95 review does not preempt Federal agency decisionmaking responsibility. Thus, if adverse comments on a project are received via the clearinghouse from a civil rights agency, it is the responsibility of the Federal agency to decide if those comments have merit in terms of its responsibilities under the various civil rights laws. This would be equally true of any comments from any source on any aspect of a proposed project. It is not the responsibility of the Federal Regional Council under its A-95 function to dictate agency policy, only to assure that agencies are in compliance with the requirements of the Circular.
>
> The workload of the Federal Regionals is heavy and diversified. The time and resources which each Council devotes to A-95 is dictated by its own priority system and resources from among competing demands. Its A-95 program, quite properly, is primarily developed on the basis of the articulated needs and desires of the clearinghouses and the State and local governments which they represent.
>
> Taken by themselves, Commission recommendations on how the FRCs might further civil rights objectives through the A-95 review process may be eminently reasonable and desirable. However, set against the above considerations, it is not very probable that FRCs would be able to implement them. The primary focus of the laws on which A-95 is based, limits on FRC authority under A-95, competing demands for limited resources, all tend to militate against the capability of FRCs to respond to Commission recommendations as fully as it might wish.[174]

OMB's statement provides information which is useful in understanding the A-95 process in general. The fact that the circular has broader purposes than civil rights, however, does not alleviate the necessity for implementing the civil rights portions of the circular. It appears that OMB believed that no prodding of the clearinghouses to carry out their civil rights responsibilities under Circular No. A-95 was necessary because the clearinghouses viewed projects from their own interests and they knew what their own interests were. OMB's comments do raise the question of what may happen when a clearinghouse is not specifically learning the impact of a proposed project on minorities or women, and whether civil rights agencies will learn from that clearinghouse of the projects they may comment on.

In the section which follows and in the section on OMB, Circular No. A-95 in chapter 2, this Commission notes a number of problems in the implementation of those portions of the circular which might be used to ensure that the impact of proposed projects on minorities and women is considered prior to Federal approval and funding.[175] Parenthetically, we note that through our draft report OMB was informed of instances in which State and local human rights agencies were not aware that they could give their views, through the A-95 process, on the impact of proposed projects.

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[174] Oaxaca letter, *supra* note 1.

[175] Despite these references, OMB stated:

> The FRCs have indicated that the entire section on A-95 is based on an assumption that if the impact of projects on minorities and women does not receive special attention by FRCs, then such civil rights concerns have been ignored. The report presents no facts whatsoever to support this position. *Id*.

We reject the implication of OMB's December 1976 responses to this section and to chapter 2 that little can be done by the Federal Government to make greater use of the A-95 process to consider in advance of funding how proposed projects will affect minorities and women. It is our view that it is incumbent upon OMB and the Federal grantmaking agencies as individual agencies and as FRC members to ensure that such evaluation occurs. This section and the section in chapter 2 on Circular A-95 attempt to describe the problems we have found in implementation of the civil rights portions of OMB Circular No. A-95 and to assess the Federal attempts to eliminate those problems.

Each of the Councils examined in this report maintained a program for executing A-95 responsibilities.[176] The activities they planned for fiscal year 1976 included sponsoring workshops or training sessions for Federal, State, and local officials; monitoring Federal agency compliance with the circular; issuing a directory of clearinghouses; and publishing a newsletter. Each Regional Council has named a coordinator as the primary person responsible for monitoring A-95 implementation in the region. Each Federal regional office head has named a person to work with the coordinator to improve intergovernmental coordination in the A-95 process.[177] Thus, although different levels of government and numerous governmental agencies are responsible for ensuring that minorities and women are not adversely affected by newly proposed federally funded projects, the FRCs are in a pivotal position to play an important civil rights role in the A-95 process.

New England

The efforts of the New England Federal Regional Council to coordinate Circular No. A-95 extend from the early 1970s[178] through fiscal year 1976.[179] The Council pledged "to fully implement all parts of OMB Circular A-95 in Region I, to ensure the evaluation, review, and coordination of all affected Federal and federally assisted programs in the Region."[180]

Nonetheless, the Council did not fulfill this objective in terms of impact on minority and female citizens.[181] Were civil rights issues to arise from the A-95 process, the Council would address them, according to the Council's staff director in 1976, but civil rights issues were not perceived as an area requiring continuous, separate, and distinct monitoring by the FRC.[182] Moreover, as of February 1976, the New England Council A-95 coordinator[183] had not encouraged the clearinghouses in the region to obtain from State human rights agencies an evaluation of impact of proposed projects on minority groups or women.[184] The coordinator had issued general directives to State clearinghouses concerning the broad factors which should be taken into account in deciding to review particular project applications, but the coordinator did not believe it to be the Council's responsibility to emphasize to the clearinghouse specific potential problems, such as those of minority groups or women.[185] The Boston FRC commented:

> FRC A-95 Coordinators have no authority to "instruct" clearinghouses. Council responsibility regarding performance by clearinghouses is to provide information and interpretation of the A-95 Circular, seeking OMB guidance if necessary. The May 5, 1975 "OMB Guidance on Implementation of Circular A-95" states on page 4: "FRC-clearinghouse relationships are

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[176] *New England FY '76 Work Program, supra* note 16, at 17-19; *Chicago FY '76 Annual Work Plan , supra* , note 17, at 1-3; *Southwest FY '76 Work Plan, supra* note 16, at 21-27; *Western FY '76 Work Plan, supra* note 17,at 21.

[177] See, for example, *Southwest FY '76 Work Plan, supra* note 16, at 22.

[178] See, e.g., *New England FY '73 Activity Plan, supra* note 103, at work item 17(a).

[179] *New England FY '76 Work Program, supra* note 16, at 17-19.

[180] Federal Regional Council, Region I (New England), *Fiscal Year 1975 Work Plan* 39 (1974) [hereinafter referred to as *New England FY '75 Work Plan*].

[181] OMB stated that "The Commission cites no specific problems or omission as the basis for its statement that the FRC has not fulfilled its A-95 objective in terms of impact on minorities and women. Therefore, we disagree with this statement." Oaxaca letter, *supra* note 1.
As noted in the remainder of this section on Boston FRC A-95 activities, public civil rights agencies often have not commented on proposed Federal projects, and the FRC had not taken sufficient action to ensure that civil rights evaluation of proposed projects took place.

[182] Strickler interview, *supra* note 112.

[183] The A-95 coordinator serves as a focal point and resource for A-95 within the FRC.

[184] Telephone interview with Thomas Melone, New England Federal Regional Council A-95 coordinator, Feb. 5, 1976. The Boston FRC commented that:

> The A-95 Circular does not *require* clearinghouses to review a project or to comment on a project's impact on minorities and women. (See *A-95: What It Is—How It Works* , 1976, pages 5 and 22.) The Circular does state that clearinghouse functions include: "Providing public agencies charged with enforcing or furthering the objectives of State and local civil rights laws with opportunity to review and comment on the civil rights aspects of the project for which assistance is sought." Such referrals are described as "obligatory referrals" on pages 16 and 17 of *A-95: What It Is—How It Works* . Oaxaca letter, *supra* note 1.

[185] Melone interview, *supra* note 184.

> critical, but need to be approached carefully. *OMB has conscientiously avoided seeming to tell any clearinghouse how to run its A-95 operation* — except in those cases where somebody complained of a clearinghouse not observing the few constraints A-95 puts upon clearinghouses." [Emphasis in Boston FRC comment.][186]

Nonetheless, this Commission notes that FRCs provided training on A-95 for State and local officials and sent directives to clearinghouses. The OMB guidance which the Boston FRC quoted makes clear that OMB avoids "seeming" to tell clearinghouses how to run their A-95 operations. Moreover, the OMB guidance makes clear that telling a clearinghouse how to run its A-95 operation is permissible when a complaint indicates that a clearinghouse is not observing A-95 procedures. This Commission believes that if problems come to light through other means than complaints, as for example through an FRC review, OMB or the FRC should be able to instruct the clearinghouse as to how the problem might be remedied.

This Commission has found, however, that public agencies charged with the protection of minority rights often did not provide comments to clearinghouses on the civil rights impacts of proposed projects either because they lacked the resources to undertake reviews[187] or were not informed of their rights in the A-95 process.[188] Such serious problems could have been uncovered by the A-95 coordinator, who then could have informed OMB of their existence and attempted to resolve them.

Chicago

As in New England, the Chicago Federal Regional Council supported an A-95 program since the early 1970s.[189] There was no mention in work plans[190] or annual reports[191] of the task force paying any attention to the impact of prospective federally assisted programs on minorities or women.[192]

Southwest

In the Southwest region, the Federal Regional Council work plan for fiscal year 1976 called for 1,858 person days to be devoted to A-95 implementation.[193] This apparent emphasis on A-95 included the following objectives: to assess member agency compliance with Circular No. A-95; to assess the capabilities of the region's 10 A-95 clearinghouses; and to hold A-95 training sessions for Federal, State, and local officials.[194] For fiscal year 1975, the Southwest Council also anticipated the adoption of "an aggressive monitoring policy by initiating periodic direct contact with regional offices, clearinghouses, and applicants,"[195] as well as evaluating the capability of the clearinghouses to receive A-95 applications and to distribute notifications.[196]

If the Council chooses to focus on civil rights issues in these objectives, this could be a step toward alleviating some of the shortcomings within the A-95 process. For instance, the Federal Regional Council could modify its A-95 evaluation procedures to ensure that notifications are sent by clearinghouses to State and local civil rights agencies for review and comment. The proposed "aggressive monitoring policy" could then be used to ensure that these notifications are timely and that subsequent comments will not be ignored during A-95 review. A similar monitoring policy could be adopted by other FRCs to help ease this widespread problem.

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[186] Oaxaca letter, *supra* note 1.

[187] The Boston FRC noted:

> The Council's A-95 Coordinator has never received a complaint from a civil rights agency that it lacked the resources to review an A-95 referral. In fact, many A-95 comments that the Coordinator has reviewed for other purposes contain extensive comments from civil rights agencies. Information on the A-95 process has been widely disseminated. Oaxaca letter, *supra* note 1.

Since OMB Circular No. A-95 does not provide for FRC funding of agencies that comment on proposed projects, it is not surprising that State and local human rights agencies have not informed the Boston FRC that they lack funds to participate in the A-95 process. As discussed in ch. 2, however, lack of funds can present a problem.

[188] This problem is discussed in detail in ch. 2, sec. VII, *supra* . To summarize, in February 1976 this Commission conducted a random survey of 17 State and local civil rights agencies. Two of these were in the New England region. Seven of the agencies surveyed did not know of their right to participate in the A-95 process, but none of these seven was in New England. This Commission does not know whether all civil rights agencies in the New England region are aware of their rights under the A-95 process as its survey was not designed to be exhaustive. One point we are trying to make, however, is that the Boston FRC has not monitored this issue.

[189] See, e.g., *Chicago FY '73 Annual Work Plan, supra* note 114, at 15.

[190] *Chicago FY '76 Work Plan, supra* note 17, at 4; Federal Regional Council, Region V (Chicago), *Annual Work Plan Fiscal Year 1975* 10–12 (October 1974) [hereinafter referred to as (*Chicago FY'75 Work Plan*].

[191] *Chicago FY '75 Annual Report* , *supra* note 17, at 16–17; *Chicago FY '74 Annual Report* , *supra* note 160, at 21; *Chicago FY '72 Annual Report* , *supra* note 105.

[192] Nor is there any mention in the letter from the chairperson of the Council to this Commission concerning consideration of these impacts. Letter from Richard E. Friedman, Chairperson, Region V Federal Regional Council, to Cynthia N. Graae, Acting Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Feb. 19, 1976.

[193] *Southwest FY '76 Work Plan, supra* note 16, at 25. For earlier Council work plan components involving OMB Circular No. A-95, see *Southwest FY '75 Work Plan, supra* note 17, at 23–26; *Southwest FY '74 Activity Plan, supra* note 106, at 46; Federal Regional Council, Region VI (Southwest), *Activity Plan for 1972–1973* 65–66 [hereinafter referred to as *Southwest FY '73 Activity Plan*].

[194] *Southwest FY '76 Work Plan, supra* note 16, at 23.

[195] *Id* .

[196] *Id* . at 24–25.

Nevertheless, as of February 1976, the Southwest Council's A-95 coordinator had not been specifically directed to pay special attention to or evaluate the impact on minority groups of the A-95 process, and no civil rights issues had arisen through the Council's A-95 task force.[197] The coordinator did concur with Commission staff, however, that there probably were civil rights problems flowing from implementation of the circular—implications of which the Federal Regional Council and the task force were unaware and therefore had not sought to address.[198]

Western

The Western Federal Regional Council demonstrated little progress in stimulating civil rights reviews concerning A-95 or in working with civil rights agencies and groups. In 1976 the Council's A-95 coordinating committee was analyzing the types of reviews that actually occurred.[199] However, over the years, rather than aggressively encouraging the review of civil rights considerations within the funding application process, the Council largely reacted to complaints or challenges advanced by State and local agencies.[200]

V. EQUAL EMPLOYMENT OPPORTUNITY

Traditionally, employers in the United States have discriminated against minorities and women in hiring and promotions.[201] While some progress toward eliminating such discrimination has occurred over the last few years, much has yet to be accomplished before legislative guarantees of equal employment opportunities, regardless of race, color, religion, sex, and national origin, become reality.[202]

As is the case with numerous other Federal agencies, all member agencies of the Federal Regional Councils have some responsibility for ensuring equal opportunity in their own employment practices. They also have responsibilities concerning the employment practices of Federal and federally assisted contractors and of their grantees.[203]

In 1975 this Commission found that the Federal effort to eliminate employment discrimination had been:

> . . .seriously hampered by lack of overall leadership and direction, deficiencies in existing laws and the assignment of authority to a number of agencies which [had] issued inconsistent policies and developed independent and uncoordinated compliance programs.[204]

The Commission concluded that the attempts by the Federal Government to coordinate equal employment efforts were "most discouraging."[205] It found that the Equal Employment Opportunity Coordinating Council (EEOCC), established in 1972 to promote coordination and eliminate inconsistencies in the operations of Federal agencies having equal employment enforcement responsibilities, had made virtually no progress.[206] This Commission concluded that this lack of progress occurred because the EEOCC lacked enforcement authority, had no permanent staff, met too infrequently, and occupied itself with the complex theoretical questions surrounding standards for validating employee selection standards.[207]

Because of EEOCC's inability to coordinate Federal equal employment enforcement activities, various employers subject to Title VII of the Civil Rights Act of 1964, as amended,[208] are confounded by the duplicative jurisdictions of various Federal agencies. Moreover, these employers are beleaguered by contradictions among different agencies' requirements. Thus, there remains a definite need for

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[197] Telephone interview with Wallace R. Greene, Southwest Federal Regional Council A-95 Coordinator, Feb. 6, 1976. As in New England, the Council had given no attention to A-95 impact on women.

[198] *Id*.

[199] Telephone interview with Robert Leavitt, Western Federal Regional Council A-95 Coordinator, Feb. 6, 1976. For a full listing of the Committee's ongoing objectives, see *Western FY '76 Work Plan, supra* note 17, at 21. For earlier A-95 activity by the Western FRC, see Federal Regional Council, Region IX (Western), *Work Plan for Fiscal Year 1975* 29, 31 (August 1974) [hereinafter referred to as *Western FY '75 Work Plan*].

[200] Leavitt interview, *supra* note 199.

[201] See, e.g., *Equality in Economic Opportunity, supra* note 92, at 19-46; J.R. Lytle, *Differences in the Occupational Standing of Negroes Among Industries and Cities* (1970); R. B. McKersie, *An Analysis of Minority Employment Patterns in the Chicago SMSA* (1967).

[202] *To Eliminate Employment Discrimination, supra* note 78, at 617.

[203] Under Title VII of the Civil Rights Act of 1964 and Exec. Order No. 11478, all Federal agencies are required to provide to all persons an equal opportunity to be hired and promoted into all types of Federal jobs. To assure equal opportunity, each agency is required to develop and implement an affirmative action plan. 42 U.S.C. §2000d-16 (Supp. V, 1975) and Exec. Order No. 11478, 3 C.F.R., 1966-1970 Comp., p. 804 (1969). Under Exec. Order No. 11246, employment discrimination by Federal contractors and federally assisted contractors on the basis of race, creed, color, or national origin is prohibited, and contractors must take affirmative action in order to promote equal opportunity. Exec. Order No. 11246, 3 C.F.R., 1964-1965 Comp., p. 339. Title VI of the Civil Rights Act of 1964 requires Federal agencies to assure nondiscrimination by their grantees.

[204] *To Eliminate Employment Discrimination, supra* note 78, at 617.

[205] *Id*. at 618.

[206] *Id*. at 647.

[207] *Id*.

[208] 42 U.S.C. §2000e, as amended by 86 Stat. 103 (1972).

Federal agencies to coordinate their enforcement activities through one governmental mechanism.[209]

While it would not be appropriate for the FRCs to assume EEOCC's function, FRCs could potentially play a useful role in the process, both with respect to internal Federal equal employment opportunity matters and in coordinating guidance within their regions to public and private employees. Indeed, some efforts were made at the regional level to coordinate these equal employment activities. First, as of April 1976, a few Federal Regional Councils had sought to coordinate the enforcement of Federal equal employment opportunity laws by developing guidelines for State and local governments.[210] Second, one FRC examined by this Commission had begun in fiscal year 1976 to consider the possibility of coordinating Federal oversight of employment practices by Federal contractors.[211] Third, in the early 1970s the FRCs supported programs for coordinating the equal employment opportunity activities of member agencies, but since fiscal year 1974 the Councils have increasingly denied such a responsibility.[212] While the Commission commends the efforts of the FRCs to deal with specific civil rights issues, the evidence is clear that without central policy guidance through OMB from those agencies charged with substantive enforcement of civil rights laws and policy, these efforts have often been ineffective or even counterproductive.[213]

The Federal Executive Boards also took a few steps to coordinate equal employment enforcement activities of Federal agencies. Although the FEBs generally did not coordinate Federal oversight of employment practices of Federal contractors or State and local governments, the Executive Boards concentrated some activities on internal Federal equal employment.[214] Despite these limited activities by the FRCs and FEBs, effective coordination of Federal enforcement of the Nation's equal employment opportunity laws was not realized.

A. Employment by State and Local Governments

State and local governments in the United States are responsible for meeting the equal employment opportunity standards of several Federal agencies. For example, under Title VII of the 1964 Civil Rights Act, they are required to adhere to the basic nondiscrimination guidelines of the Equal Employment Opportunity Commission[215] and are subject to suit for noncompliance in Federal district court by private plaintiffs or the Department of Justice.[216] The Equal Pay Act, which requires that employees performing equal work must be paid equal wages regardless of sex,[217] was amended in 1974 to include all State and local government employees. It is enforced by the Department of Labor.[218] Federal Merit System standards, administered by the Civil Service Commission, require nondiscrimination on the basis of race, national origin, sex, and physical handicap in the selection, promotion, and compensation of State and local employees in more than 30 programs funded by four Federal agencies.[219] There are also Federal equal employment opportunity requirements under Title VI of the Civil Rights Act of 1964[220] and under numerous other laws establishing assistance programs administered by such agencies as the Department of the Treasury and the Law Enforcement Assistance Administration of the Department of Justice.[221]

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[209] Problems of contradiction and inconsistency were evident, for example, in Local 189, United Papermakers v. United States, 416 F.2d 980, 997 (5th Cir. 1969).

[210] See the discussion in sec. V(A) *infra*.

[211] See the discussion in sec. V(B) *infra*.

[212] See the discussion in sec. V(C) *infra*. Southwest FRC officials, for example, believe that internal Federal equal employment opportunity activities should not be the responsibility of the Council. The chairman of the Council believed it to be the responsibility of the individual agencies; the staff director stated it should be the responsibility of the Civil Service Commission, and the director of CSC for the Dallas region noted that it should be the job of the Federal Executive Board. Foreman interview, *supra* note 102; telephone interview with David Dehlin, Staff Director, Southwest Federal Regional Council, Feb. 5, 1976; and telephone interview with Edward Vela, Jr., Southwest Regional Director of CSC and ad hoc member of the Southwest FRC, Feb. 3, 1976.

[213] It should be noted that for fiscal year 1977 the Councils were provided some guidance, through formal USG guidelines, on equal employment matters. The Civil Service Commission has been designated to act as the "lead agency" for EEO affirmative action. USG's instruction to the FRCs reads in its entirety:

> Draft guidance on [EEO affirmative action] was distributed to FRCs and USWG members for comment on July 20, 1976, by CSC. Final guidance to govern the FY 1977 FRC activities will be distributed subject to the final submission by CSC for USG approval. OMB, *FY 1977 FRC Guidelines: Role, Guidance, and Management* 7 (1976).

[214] These activities are specifically discussed in ch. 4, *infra*.

[215] 42 U.S.C. §2000e (1970), as amended by 86 Stat. 103 (1970).

[216] 42 U.S.C. §2000e–5(f) (1970).

[217] 29 U.S.C. §206(d)(1) (1970).

[218] 29 U.S.C. §203(4) (Supp. V, 1975).

[219] These agencies are the Departments of Health, Education, and Welfare; Labor; Defense; and Agriculture. 45 C.F.R. Part 70 (1975); 7 C.F.R. Part 18 (1968).

[220] 42 U.S.C. §2000d (1970). Employment practices are covered under Title VI where providing employment is a primary purpose of the assistance or where discrimination in employment will affect the services provided. For example, discrimination in the selection of school teachers or doctors in a hospital increases the likelihood of discriminatory treatment of the students or patients.

[221] See, for example, the State and Local Fiscal Assistance Act of 1972 which created the general revenue sharing program and prohibits discrimination in the expenditure of general revenue sharing funds (31 U.S.C. §§1221 *et seq.* (Supp. V, 1975); and the Omnibus Crime Control and Safe

A number of FRCs have undertaken activities largely on their own initiative for the purpose of assisting State and local governments to improve their employment of minorities and women. Federal Regional Councils should be commended for attempting to address equal employment opportunity questions without formal guidelines from the Under Secretaries Group.[222]

These activities, which are discussed on the following pages, were largely limited to developing guidelines for affirmative action by State and local governments.[223] There are, however, a number of other coordination activities that potentially could reduce inconsistencies and duplication in equal employment opportunity compliance programs at the regional level, such as establishing mechanisms to facilitate data sharing and joint compliance reviews and complaint investigations.[224]

New England

The New England Federal Regional Council seriously attempted to address the need for uniform affirmative action guidelines to assist State and local governments in the region. A study group was created in September 1973 to explore this problem.[225] It first tried to review the affirmative action guidelines of all member agencies but failed to finish the job because it "proved to be an insurmountable task."[226] The study group next considered several alternatives. For example, it examined guidelines which had been developed by the Region VI (Dallas) Council and concluded that these were unacceptable for Region I.[227] Then the group turned to EEOC's guidelines,[228] determining that, even though they were designed for private employers, they were preferable to other Federal standards developed to that time.[229] After working for more than a year, the group presented FRC members with four action alternatives: adopt EEOC's guidelines for private employers, attaching a list of modifications necessary for use by State and local governments; adopt EEOC's guidelines with actual changes made on each page and append copies of all member agencies' equal employment opportunity regulations; adopt a summary affirmative action plan guideline and include references to Federal and State regulations; or request that EEOC develop specific guidelines for State and local governments.[230]

The Council believed that either of the first two alternatives would be too extensive an undertaking given its resources and that the third alternative "would not supply the detail necessary to assist State and local governments in a field that is still relatively new and unfamiliar to them."[231] The fourth alternative was favored by the Council,[232] which then

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Streets Act of 1968, as amended, which provides funds to State and local governments for law enforcement purposes and prohibits discrimination on the basis of race, color, national origin, and sex in LEAA funded programs (42 U.S.C. §3701 *et seq.* (1970).

[222] Equal employment opportunity activities for the FRCs are not mentioned in formal USG guidelines. See *FY 1976 FRC Guidelines, supra* note 12; *FY 1975 FRC Guidelines, supra* note 8; *FY 1974 FRC Guidelines, supra* note 39.

[223] As of March 1976, four FRCs had issued guidelines. These were the FRCs in Atlanta, Dallas, Kansas City, and Philadelphia.

[224] The Civil Service Commission has written to this Commission that it shares the "general theme" that the FRCs "are potentially vital instruments in guaranteeing civil rights generally and in achieving equal opportunity in public sector employment particularly." Letter from Raymond Jacobson, Executive Director, U.S. Civil Service Commission, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Feb. 9, 1977 [hereinafter referred to as Jacobson letter].

[225] Memorandum from David W. Hays, Chairman, New England Federal Regional Council, to Fernando Oaxaca, Associate Director for Management and Operations, OMB, Sept. 29, 1975, at 3 [hereinafter referred to as Hays memorandum].

[226] *Id.*

[227] *Id.* The New England Regional Council stated that the Southwest guidelines "appeared to need revisions if we were to adopt them in New England." *Id.*

[228] U.S. Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment: A Guidebook for Employers* (2 vols., 1974) [hereinafter referred to as *Affirmative Action and Equal Employment*].

[229] Hays memorandum, *supra* note 225, at 3. The other guidelines considered included the four-agency memorandum developed by DOL, CSC, EEOC, and the Department of Justice. See memorandum from Robert Hampton, Chairman, U.S. Civil Service Commission; J. Stanley Pottinger, Assistant Attorney General; Philip J. Davis, Acting Director, Office of Federal Contract Compliance, for U.S. Attorneys *et al.*, "Federal Policy Remedies Concerning Equal Employment Opportunity in State and Local Personnel Systems," Mar. 23, 1973, [hereinafter referred to as "Federal Policy Remedies Concerning Equal Employment Opportunity in State and Local Personnel Systems"]. The group also considered the guidelines of the Department of the Treasury, *General Revenue Sharing and Civil Rights* (undated); and Civil Service Commission, *A Guide for Affirmative Action for State and Local Governments* (undated).

[230] *Id.* at 4.

[231] *Id.*

[232] *Id.* at 5. The Council's analysis of this alternative was as follows:

> Uniform state and local government guidelines, authored at the national level and endorsed by the [Equal Employment Opportunity] Coordinating Council, would be more effective inasmuch as the guidelines would obviate the need for ten regional parochial efforts. They would have the additional advantage of nationwide distribution. A national project of this stature would cut back parallel efforts around the Nation with their duplicative results. The job of trying to reconcile interpretations of statutes can be done better at the national level. The USG through national agencies should undertake to reconcile any conflicting regulations. These guidelines could be state and local governments compliance guideline [sic] just as the two-volume EEOC document for employers is considered *the* guideline for the private sector contract compliance. The uniform guideline should permit the continued utilization of already adopted regional guidelines (Regions IV, VI, VII) which contain the basic provisions with variations to address regional differences. *Id.* [Emphasis in original].

contacted EEOC and discovered a "willingness and interest" in preparing the guidelines.[233]

The Council thus forwarded its position paper to the Under Secretaries Group in Washington, asking that the Equal Employment Opportunity Coordinating Council (EEOCC) request EEOC to modify its guidebook for use by State and local governments.[234] On October 16, 1975, USG discussed the topic at its meeting, which was also attended by the chairperson of the EEOCC,[235] who agreed to review the problem.[236] Over a year later a general statement of agreement did result,[237] and this agreement was in part due to the New England Council's aggressive pursuit of the problem.

Chicago

During fiscal year 1976 the Region VI Council ventured into the early stages of developing equal employment opportunity guidelines for State and local governments.[238] According to the chairperson of the Council's task force in charge of the project, the Chicago FRC took three steps in the direction of standard guidelines.[239] First, questionnaires were distributed to Council member agencies requesting information concerning their affirmative action requirements for contractors and State and local governments.[240] Second, both the Civil Service Commission and the Equal Employment Opportunity Commission were requested to provide input into the process of developing the guidelines.[241] Third, the task force analyzed the guidelines of the Dallas and Kansas City Federal Regional Councils[242] to determine if they should be adopted, partly or wholly, for Region V.[243]

As of March 1976, the expectation of the task force chairperson was that the guidelines would be completed and adopted by the Council by the end of fiscal year 1976, but as of September 1976 he was unaware of any progress.[244] Nonetheless, the Civil Service Commission had appeared to take the lead role in developing guidelines for all FRCs, and in December 1976 OMB informed this Commission that "final guidance has USG approval and [has] been issued to the FRCs."[245]

Southwest

The Southwest Federal Regional Council has construed State and local employment questions as directly within its mandate, thus incorporating them into the Council's activities.[246] On May 6, 1975, it adopted equal employment opportunity guidelines for the Southwest region to help State and local agencies to comply with various Federal laws.[247]

In fiscal year 1976 the Dallas Council attempted to circulate and publicize these guidelines.[248] Based on reports from the region, it appears that the guidelines have been gratefully received[249] by a host of State and local officials. The next task, from the FRC's perspective, is for these officials to begin implementing the guidelines.

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[233] *Id* . The group had been consulting with EEOC for several months prior to this time. Strickler interview, *supra* note 112; and telephone interview with Evelyn Idelson, Education Programs Officer, Division of Voluntary Compliance, EEOC, Jan. 16, 1976.

[234] Hays memorandum, *supra* note 225, at 5.

[235] "Highlights: Under Secretaries Group Meeting, Oct. 16, 1975," OMB, Oct. 16, 1975.

[236] Letter from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to Harold R. Ryler, Jr., Chairman, EEOC, Deputy Attorney General, Nov. 17, 1975.

[237] 41 *Fed. Reg.* 38814 (Sept. 13, 1976).

[238] Telephone interview with LeRoyal King, Chairperson, Chicago FRC Task Force on External Equal Employment Opportunity, Mar. 10, 1976. This project was one of several activities of this task force, discussed in sec. V(B) *infra* .

[239] King interview, *supra* note 238.

[240] *Id* . As of March 1976, the results of the questionnaire were inconclusive, but the task force was following up the questionnaire with personal contacts. *Id* .

[241] *Id* . Aside from this example, the Region V Council has generally failed to invite EEOC to participate in FRC activities. Interview with Elmer McClain, Director, Chicago Regional Office, EEOC, Jan. 28, 1976.

[242] The Dallas guidelines are discussed *infra* this section. The Kansas City guidelines were being completely revised. Telephone interview with Jeremy Coleman, Staff Director, Kansas City, FRC, Mar. 30, 1976.

[243] King interview, *supra* note 238.

[244] Telephone interview with LeRoyal King, Chicago FRC Task Force on External Equal Employment Opportunity, Sept. 17, 1976.

[245] Oaxaca letter, *supra* note 1. The Civil Service Commission stated:

> . . .[T]he detailed plan prepared by the Civil Service Commission in response to OMB's invitation to us to be the lead agency on EEO matters with the Federal Regional Councils. . . .approved by the Under Secretaries Group and distributed to FRC's on November 29, 1976, demonstrates convincingly our willingness—even eagerness—to undertake the task and to be held accountable for its accomplishment. Jacobson letter *supra* note 224.

[246] Dehlin interview, *supra* note 212; Vela interview, *supra* note 212; and Foreman interview, *supra* note 102.

[247] Federal Regional Council, Region VI (Southwest), *Uniform Interagency Guidelines for EEO Affirmative Action Plans* (July 1975) [hereinafter referred to as *Southwest Guidelines*]. See also *Southwest FY '75 Work Plan* , *supra* note 16. According to the Southwest FRC: "The document adopted was a 'how-to-do-it' self-help guide to developing an affirmative action plan which was never intended to be considered a regulation. . . ." Oaxaca letter, *supra* note 1.

[248] Federal Regional Council, Region VI (Southwest), *Program Objectives Fiscal Year 1976* (1975) [hereinafter referred to as *Southwest FY '76 Program Objectives*].

[249] Foreman interview, *supra* note 102; Dehlin interview, *supra* note 212; and Vela interview, *supra* note 212. See also, e.g., letter from Jerry Apodaca, Governor, State of New Mexico, to Ed Foreman, Chairman, Southwest Federal Regional Council, Jan. 7, 1976; letter from Dolph Briscoe, Governor, State of Texas, to Ed Foreman, Chairman, Southwest Federal Regional Council, Dec. 29, 1975; letter from Edwin Edwards, Governor, State of Louisiana, to Ed Foreman, Chairman, Southwest Federal Regional Council, Dec. 29, 1975; letter from Jason Luby, Mayor, Corpus Christi, Texas, to Ed Forman, Chairman, Southwest Federal Regional Council, Jan. 8, 1976; letter from Donald C. Rider, Executive Director, Oklahoma Municipal League, to Ed Foreman, Chairman, Southwest Federal Regional Council, Dec. 31, 1975.

Unfortunately, as of 1976, there were at least three very serious weaknesses in these guidelines.[250] First, although the guidelines were adopted to reduce the burden upon State and local governments created by duplication and inconsistency in the equal opportunity requirements of Federal agencies, they did not significantly contribute to accomplishing this goal because they did not extend to two major equal opportunity requirements. Compliance with the guidelines would not have satisfied requirements under Executive Order 11246[251] or Title VII, the major Federal prohibitions of employment discrimination.

Second, the guidelines failed to make clear that they did not extend to Title VII. All regional Federal offices that were FRC members in May 1975—the Departments of Agriculture; Health, Education, and Welfare; Housing and Urban Development; the Interior; Labor; Transportation; and the Community Services Administration, the Environmental Protection Agency, and the Law Enforcement Assistance Administration—agreed that State and local government compliance with the guidelines would be accepted as meeting "basic Federal EEO affirmative action requirements."[252]

Even though the FRC made clear that there was a major exception to this pledge, since Executive Order 11246 as amended was not covered,[253] the commitment was deceptive. It did not state that compliance with the guidelines would not satisfy the requirements of Title VII of the Civil Rights Act of 1964, with which all State and local governments must comply.[254] On the contrary, the guidelines implied that compliance with the guidelines was sufficient for compliance with Title VII, as excerpts from Title VII were included as an appendix to the guidelines. Unless a State or local government, on its own initiative, discovered that the term "basic Federal EEO affirmative action requirements" did not include Title VII, the government may have been unaware that compliance with the Dallas guidelines was little protection against a successful lawsuit under Title VII.

It is this Commission's view that all affirmative action plans should follow the standards set forth by the Office of Federal Contract Compliance of the Department of Labor[255] and the Equal Employment

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[250] Nonetheless, the Council believed that it has made substantial progress in handling a major problem:

> With the guidance and direction of the Civil Service Commission, the Dallas Region has achieved a seemingly impossible task of bringing about agreement among approximately nine Federal agencies having highly diverse purposes and approaches to carrying out those purposes. Although the GWAA [Government Wide Annual Arrangements] projects are also exemplary of various agencies coordinating efforts, achievement of this program objective is extremely noteworthy due to the very nature of the differing approaches to affirmative action for equal employment opportunity. The diversity of purposes of the individual Federal agencies is equaled only by the diversity of approaches and interests of those agencies in the area of affirmative action and equal employment opportunity. *Southwest FY '75 Work Plan*, *supra* note 16.

[251] The guidelines stated:

> NOW, THEREFORE, with one exception, we hereby resolve that any EEO affirmative action plan written, and actively implemented, so as to equal or exceed the substance of the *Guidelines* , will meet basic Federal EEO affirmative action requirements. The exception applies to public agencies acting as Federal contractors under Executive Order 11246/11375, who are required to develop a plan in accordance with Chapter 60 of Title 41 CFR. *Southwest Guidelines*, *supra* note 247 (inside cover).

In addition, the introduction to the guidelines stated: . . .some statutes, regulations and executive orders contain provisions for sanctions against employers, grantees and contractors not complying with specific requirements. Employers who are Federal contractors subject to Executive Order 11246, as amended, and Revised Order No. 4, should refer to the Federal Contractors Section of these *Guidelines* to insure that their affirmative action plans are in compliance with the material presented therein. *Id* . at introduction.

[252] *Id* . (inside cover).

[253] *Id* .

[254] Moreover, the guidelines did not apply to equal employment opportunity requirements of nonmember agencies. Thus, State and local governments complying with the guidelines may still be required to adhere to other equal employment opportunity requirements, such as those of the Office of Revenue Sharing of the Department of the Treasury. In fiscal year 1975, the Office of Revenue Sharing provided more than $6 billion in fiscal assistance to State and local governments. Department of the Treasury, *Federal Aid to States: Fiscal Year 1975* at 17. In defense of its *Guidelines* , however, the Dallas FRC stated:

> Any employer preparing an affirmative action plan (AAP) in accordance with the *Guidelines* and then implementing the AAP, would probably be more likely to have protection against a successful lawsuit under Title VII than would an organization which failed to examine its personnel system and neglected to correct inadequacies. Title VIII has no requirement for preparing a voluntary AAP but does empower EEOC to place such an obligation on an employer when sufficient evidence of discriminatory practices is discovered during the course of an investigation. Oaxaca letter, *supra* note 1.

EEOC, however, strongly encourages employers to develop voluntary affirmative action plans pursuant to Title VII, including goals and timetables to remedy past discrimination. EEOC, *Affirmative Action and Equal Employment* (1974). EEOC states:

> The Equal Employment Opportunity Commission cannot guarantee that following this guide [*Affirmative Action and Equal Employment*] will provide "immunity" from charges of discrimination which may be filed against you. However, if you undertake the affirmative actions recommended with the same commitment, efforts and monitoring applied to your other basic organizational goals, the resulting employment system should provide equal opportunity as required by law. *Id* . at 2.

[255] See Office of Federal Contract Compliance, Revised Order No. 4, 41 C.F.R. §60–2.1 *et seq.* (1975) and Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment*, *supra* note 228. While the authority of this Revised Order No. 4 extends only to companies that are nonconstruction contractors of the Federal Government, the order describes the steps necessary for any employer to ensure nondiscrimination in employment practices and to affirmatively eliminate underutilization of minorities and women. Revised Order No. 4 is discussed at length in U.S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* (February 1973) [hereinafter referred to as *Statement on Affirmative Action for Equal Employment Opportunities*] and *To Eliminate Employment Discrimination*, *supra* note 78, ch. 3.

Opportunity Commission.[256] An affirmative action plan should contain a work force analysis, by grade levels, to determine if there are fewer women or minorities employed in each job category than would be expected by their availability for the job.[257] If this analysis shows that women and minorities are underutilized in the employer's work force, the employer should be required to develop numerical goals and timetables, or measurable targets, which must be directed to obtaining prompt and full utilization of minorities and women. Goals and objectives must be developed by job classification and organizational unit.[258] Additional elements that should be required of an affirmative action plan include the development and implementation of internal auditing systems to measure the effectiveness of the plan,[259] the development or reaffirmation of an equal employment opportunity policy and dissemination of the policy,[260] the development and implementation of "action oriented" programs (such as empirical validation of tests and other selection techniques to assure their job-relatedness[261] and elimination of barriers to minority and female recruitment),[262] and support of outside programs designed to improve employment opportunities for minorities and women.[263]

The Dallas guidelines contained commendable procedures for recruiting minorities and women. They also adopted a number of elements of an affirmative action plan which were of secondary importance, including the issuance of policy statements declaring that discrimination on the grounds of race, color, national origin, sex, and religious identification is illegal[264] and the designation of individuals and organizational units to be responsible for implementing affirmative action programs.[265]

However, the third major weakness in the guidelines was that they did not require State and local governments to assess adequately the disparities in their employment profiles, to develop goals or annual objectives for eliminating such disparities, or to report on any progress in improving the status of minority and female employment in their work forces.[266] The guidelines referred generally to the need for "specific, realistic, and achieveable timetables and target dates. . . ."[267] There was no requirement for goals, no suggestion of what the goals should be, no specifics of how State and local governments should develop short-term and long-range goals, and no detailed description of how to develop a program to implement these goals.[268] Nor did the Southwest guidelines address the testing issue in detail.[269]

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[256] Standards under Title VII are similar to those under Exec. Order No. 11246. This Commission has noted that:

> Under Revised Order No. 4, contract compliance agencies are asking nothing more of potential contractors than would be the case in a proceeding under Title VII. Potential Federal contractors merely are being asked, as a condition for obtaining a lucrative government contract, to follow voluntarily procedures that they are, for the most part, required to follow under Title VII. Statement by Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Before the Fact-finding Hearing Convened by the Secretary of Labor on the Implementation of Executive Order 11246 Affirmative Action Requirements As Applied to Employment at Institutions of Higher Education, Nov. 12, 1974.

The Dallas FRC stated:

> The *Guidelines* encompass entirely the intent of the standards set forth by the Office of Federal Contract Compliance [Programs] of the Department of Labor and the Equal Employment Opportunity Commission with the exception of imposed remedial actions, which the *Guidelines* were never intended to cover. Oaxaca letter, *supra* note 1.

We disagree that "imposed remedial actions" are the distinguishing factor between the Dallas guidelines and the standards of EEOC or the Office of Federal Contract Compliance Programs (OFCCP). We find that the most salient distinction between the Dallas *Guidelines* and standards for affirmative action of the other two agencies was that the latter two contain specific instructions for setting goals and timetables to remedy past discrimination. Goals and timetables are not merely court-imposed remedies. They may, and indeed should, be adopted voluntarily as a corrective measure where there has been past discrimination.

It is our view that instructions for developing affirmative action plans must explain the need for invoking remedial action, including goals and timetables, when work force analyses and analyses of selection procedures reveal that the employers' practices have had a discriminatory effect. Such instruction is contained in the EEOCC's policy statement on affirmative action for State and local governments, signed after the Dallas FRC guidelines were adopted. Equal Employment Opportunity Coordinating Council, Affirmative Action Programs for State and Local Government Agencies, Policy Statement, 41 *Fed. Reg.* 38814 (Sept. 13, 1974).

[257] 41 C.F.R. §60-2.11(a) (1975), as revised, 39 *Fed. Reg.* 25654 (1974). Availability is determined in the area's work force, the number of minorities and women having the necessary skills for the jobs, the existence of training institutions, and the size of minority and female unemployment in the surrounding area. The employer must also consider the availability of promotable and transferable minority and female employees within its organization. See 41 C.F.R. §60-2.11(b) (1975), and memorandum from Philip J. Davis, OFCC, to Heads of All Agencies, Technical Guidance Memo. No. 1 on Revised Order No. 4, Feb. 23, 1974.

The Dallas FRC stated, "The factors to be considered in making a work force analysis are outlined in detail in the *Guidelines* , pages 2 and 3 of Section I, and pay level is one of the factors discussed." Oaxaca letter, *supra* note 1. For the Dallas FRC's suggested work force analysis, see *Southwest Guidelines* , *supra* note 247, §1.

[258] See 41 C.F.R. §60-2.10-12 (1975). Goals are not quotas which must be met but rather, objectives by which good faith efforts may be measured. 41 C.F.R. §60-2.12 (1975). Determination of whether a contractor is in compliance with the Executive orders is not judged solely by whether or not it reaches its goals; instead, a contractor's compliance status is reviewed in light of the contents of the total affirmative action plan and the extent of adherence to the plan. 41 C.F.R. §60-2.14 (1975). A failure of a contractor to meet its goals may result in the issuance of a show-cause notice.

[259] For the FRC's guidelines concerning the monitoring and reporting elements of an EEO program, see *Southwest Guidelines* , *supra* note 247, §8.

[260] The Dallas FRC notes that "This is fully described. . . ." Oaxaca letter, *supra* note 1. See *Southwest Guidelines, supra* note 247, §2.

[261] The Supreme Court has held that if a selection procedure which results in a disproportionate rejection of minority applicants cannot be shown to be related to job performance, that practice is prohibited. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Dallas FRC stated, "In the *Guidelines* page 1 of Section V discusses the necessity of valid selection methods and Section IV is devoted to recruitment practices." Oaxaca letter, *supra* note 1.

[262] See *Southwest Guidelines* , *supra* note 247, §§4–5. This Commission has identified some common examples of discriminatory recruitment barriers:

> When an employer. . .relies upon word-of-mouth contact for recruitment, minority persons who have less access than other persons to informal networks of employment information, such as through present employees or officials, are denied equal access to available opportunities. Recruitment at schools or colleges with a predominantly nonminority or male makeup is discriminatory when comparable recruitment is not done in predominantly minority or coed institutions. *Statement on Affirmative Action For Equal Employment Opportunities, supra* note 255, at 5.

[263] See *Southwest Guidelines* , *supra* note 247, section on records and reports.

[264] *Id.*, introduction and §2.

[265] *Id.*

Moreover, State and local governments were not directed to cross-tabulate all employment statistics according to race, ethnic origin, or sex,[270] despite the fact that cross-tabulated data are needed in the development of adequate employment goals.[271] Nor did the guidelines adequately inform State and local officials of remedial actions provided by Title VII.[272]

One reason that the guidelines did not meet Title VII standards was that the Southwest Federal Regional Council relied largely upon the Civil Service Commission.[273] EEOC was not invited to participate on the committee created to formulate these standards.[274] On the other hand, the Civil Service Commission, which like EEOC is not a Council member, was formally invited to serve as the lead agency for developing these standards and its regional director was selected as the committee chairman.[275] As a result, there were no major differences in content and principle between CSC and FRC affirmative action guidelines.[276] The Dallas guidelines were drawn directly from the Civil

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[266] The Dallas FRC stated, "The *Guidelines* contain an entire section on this subject and discussion of reporting and recordkeeping are found throughout the *Guidelines* ." Oaxaca letter, *supra* note 1. This Commission has found nothing in the *Guidelines* which requires State and local governments to report or even keep a record of their progress in improving the status of minority and female employment. The section to which the Dallas FRC refers contains sample forms and two paragraphs, one of which concerns records on handicapped employees and older workers. The other paragraph states in its entirety:

> As directed in the *Guidelines* , a good internal reporting system is necessary to the success of the affirmative action plan and EEO program. The sample forms included in this section are typical of working papers and statistical reports which might facilitate the evaluation of the program. The forms are suggestions only and may require revision or modification to meet the needs of the particular jurisdiction. *Southwest Guidelines* , *supra* note 247, section on records and reports.

[267] *Id* ., introduction. In the reference section at the end of the guidelines, the Council included a copy of the Mar. 23, 1973, four agency agreement, *supra* note 229. The Dallas FRC later commented:

> It is our opinion that each employer should decide, based on work force and labor market analyses, whether goals are necessary. We wish to point out that on page 1 of the Introduction to the *Guidelines* , the content of the March 23, 1973, agreement is briefly described and the reader is referred to the Reference Section for the complete text. Oaxaca letter, *supra* note 1.

Council members believed that the inclusion of this agreement, although not explained in the text of the FRC guidelines, was adequate for informing State and local governments on the questions of goals and timetables. Telephone interview with Judy Earnhart, Personnel Management Specialist, Intergovernmental Personnel Programs Division, Dallas Regional Office of the Civil Service Commission, Mar. 12, 1976.

[268] *Id* . See also the section of the guidelines entitled "Labor Market Analysis." According to the Southwest regional director of CSC, numerical goals and timetables were not specifically discussed because no one standard could be applied to all State and local governments of the region. Vela interview, *supra* note 212. According to another FRC official, the guidelines were developed to address the general EEO process, not to provide specifics as to timetables or goals. Interview with Willard Lewis, chairperson, Southwest FRC Task Force on Native Americans, Feb. 23, 1976.

[269] According to the regional director of the Civil Service Commission, testing was not considered because much controversy surrounds the question of what is an appropriate test. Vela interview, *supra* note 212. Later the FRC noted:

> The subject of test validation is a highly technical and complex field. To discuss that area in detail would create a voluminous document. Other areas, such as job classification, salary administration and the determination of training needs, were not covered in detail for substantially the same reason. Oaxaca letter, *supra* note 1.

[270] *Southwest Guidelines*, *supra* note 247, at §1. The guidelines did not specifically state that all data should be cross-tabulated according to sex and minority groups. One of the members of the task force that assembled the guidelines has stated that the need for cross-tabulations may be inferred from the listing of groups to be included in data collection. Earnhart interview, *supra* note 267.

[271] *To Eliminate Employment Discrimination, supra* note 79, at 94.

[272] The guidelines included no discussion of remedial actions under Title VII, although Title VII is mentioned in the introduction to the guidelines as one statutory provision with which State and local governments must comply. Moreover, Title VII was not reprinted in the reference section to the guidelines. Instead, only §703(a) of Title VII was reprinted. The omission of discussion of Title VII was largely due to the task force's assumption that most State and local governments were aware of Title VII's remedial provisions. Earnhart interview, *supra* note 267.

[273] For a discussion of this Commission's evaluation of CSC guidelines, see *To Eliminate Employment Discrimination* , *supra* note 78, at 17–19 and 87–20.

[274] Interview with Larry Ramirez, Director, Dallas Regional Office, Equal Employment Opportunity Commission, in Washington, D.C., Jan. 29, 1976. Similarly, the Federal Regional Council based in New York City selected the Civil Service Commission, rather than EEOC, to take the primary lead in Council activities relating to external employment. Interview with Edward Mercado, Director, New York Regional Office, Equal Employment Opportunity Commission, in Washington, D.C., Jan. 29, 1976. OMB stated:

> We recommend the report provide a more explicit description of the basic differences between CSC and EEOC over the most effective methods of achieving equal employment opportunity objectives by State and local governments. As now written, the report seems to imply the FRCs were at fault in not adopting certain features of the EEOC-supported approach without explaining the underlying disagreements involved. Oaxaca letter, *supra* note 1.

This section, concerning the Dallas Federal Region Council's activities to further equal employment opportunity in State and local governments, critiques the guidelines adopted by the Dallas Federal Regional Council. Our evaluation is based on this Commission's position on affirmative action and not specifically on differences between CSC and EEOC. Thus, a more explicit description of differences between EEOC and CSC would not contribute to this section. This Commission has, however, on a number of occasions commented favorably concerning EEOC's guidebook, *Affirmative Action and Equal Employment* . See, for example, *To Extend Federal Financial Assistance* , *supra* note 78, at 68 and 299.

[275] Ramirez interview, *supra* note 274. The EEOC director for the Dallas region stated that CSC essentially wrote the guidelines for the Council without significant input from other Federal agencies. *Id* . This was also the view of another EEOC official involved in this general matter. Idelson interview, *supra* note 233. In his memorandum to Fernando Oaxaca, *supra* note 225, the Chairman of the New England Federal Regional Council, similarly stated that the "Region VI guidelines [were] put out by the Civil Service Commission and endorsed by the Dallas Federal Regional Council." However, according to the Earnhart interview, *supra* note 267, CSC requested that EEOC review the guidelines.

[276] Earnhart interview, *supra* note 267.

Service Commission's *Affirmative Action Plan for Equal Employment Opportunity*.[277]

Western

The San Francisco Federal Regional Council supported no task force or working group with regard to State and local employment practices.[278] It merely circulated among member agencies guidelines formulated in other regions[279] as a first step toward determining if the Council might seek to develop regional guidelines.

B. Employment by Federal Contractors

The Secretary of Labor, under Executive Order 11246 as amended,[280] is responsible for administering and overseeing a program to eliminate employment discrimination by Federal contractors and subcontractors on grounds of color, race, sex, creed, or national origin. This responsibility is delegated to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).[281] OFCCP, in turn, has delegated some authority to 17 Federal contracting agencies, whose compliance programs it oversees.[282]

Coordination between Federal agencies with contract compliance responsibilities and those with responsibilities for enforcing other equal employment opportunity requirements can serve to eliminate duplication and inconsistency.[283] Nonetheless, only one of the Federal Regional Councils studied by Commission staff had specifically included the Federal contract compliance program in its consideration of affirmative action guidelines,[284] and at least two regions excluded contract compliance altogether from their attempts to develop guidelines.[285] There was some independent attention to employment practices of Federal contractors by the New England, Chicago, and San Francisco Councils. As evidenced by work plans and annual reports, however, these FRC operations were generally phased out or deemphasized over the last few years.[286]

New England

As of early 1976, the New England Federal Regional Council did not maintain any program which related to contract compliance.[287] In addressing the question of guidelines for State and local employment in 1975,[288] the FRC deliberately excluded the employment practices of Federal contractors.[289] In December 1976, however, the Boston FRC stated:

> Since this report was drafted, the FRC has established a Contract Compliance Committee which will meet on a quarterly basis under the lead of the Department of Labor and chaired by OFCCP to exchange information on program experience and to identify existing or potential issues and problems. OFCCP will take action as necessary to resolve issues. This activity is described in the FRC's FY 1977 work program.[290]

Chicago

A principal objective of the external affirmative action task force of the Chicago Federal Regional Council for fiscal year 1976 was to "offer leadership" to Federal agencies, grantees, and contractors in "seriously" pursuing affirmative action.[291] This broad objective had a number of specific goals: to review member agency affirmative action regulations, to examine agency preaward and contract compliance procedures, to suggest means of improving affirmative action requirements of member agencies, and to hold conferences on designing and implementing affirmative action plans.[292]

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[277] See U.S. Civil Service Commission, Dallas Region, *Affirmative Action Plan for Equal Employment Opportunity* (1973). During the early development of the guidelines, the Chief of the Merit Systems and Technical Assistance Branch wrote a memorandum to the FRC Secretariat, noting:

> Should the Council decide to adopt this document as the uniform approach to be followed by its members in grant programs including State and local governments, we will have covers of our existing supply imprinted with the seals of all SWFRC member agencies on the right-hand side of the cover design. Memorandum from Harold D. Monk, Chief, Merit Standards & Technical Assistance Branch, U.S. Civil Service Commission, to Southwest Federal Regional Council Secretariat, Nov. 21, 1973.

[278] Telephone interview with Alan Raznick, Acting Staff Director, Western Federal Regional Council, Feb. 6, 1976; and Otis interview, *supra* note 32.

[279] Raznick interview, *supra* note 278.

[280] Exec. Order No. 11246, 3 C.F.R., 1964–1965 Comp., p. 339 *as amended by* Exec. Order No. 11375, 3 C.F.R., 1966–1970 Comp., p. 684.

[281] OFCCP is discussed in *To Eliminate Employment Discrimination, supra* note 78, at ch. 3.

[282] 41 C.F.R. §60–1.2 (1975).

[283] The need for coordination of Federal equal employment opportunity responsibilities is discussed earlier in this section.

[284] The exception was the Chicago Council. Friedman letter, *supra* note 192, at 4.

[285] See the discussion of the Southwest guidelines in sec. V(A) *supra*. See also the exclusion of contract compliance in the New England program.

[286] See, e.g., note 17 *supra*.

[287] Strickler interview, *supra* note 112; telephone interview with David W. Hays, Chairman, New England Federal Regional Council, Jan. 29, 1976.

[288] See the discussion in sec. V(A) *supra*.

[289] Strickler interview, *supra* note 112. The Council had, however, devoted resources to this area in the early 1970s. See *New England FY '73 Activity Plan, supra* note 103, at work item number 16.

[290] Oaxaca letter, *supra* note 1.

[291] *Chicago FY '76 Work Plan, supra* note 17, at 28.

[292] *Id.*

In a few narrow areas, it appears that the Chicago task force made some progress toward achieving these goals. For example, through the Council, member agency officials in fiscal year 1976 received an indepth briefing from Department of Labor officials regarding the affirmative action requirements of Executive Order 11246.[293] The task force also distributed questionnaires to all Council member agencies to determine their responsibilities and operating procedures for promoting the equal employment opportunity activities of contractors and grantees.[294]

On balance, however, the FRC staff director and the task force chairperson acknowledged that, except for these activities, there had been no accomplishment in this program during the first 7 months of the 1976 fiscal year.[295] The task force chairperson attributed this failure to the lack of experience of many task force members in contract compliance, apathy toward equal employment opportunity of several member agencies, and inadequate staff and budget allocations to the task force by the Chicago Council.[296]

Southwest

The *Uniform Interagency Guidelines for EEO Affirmative Action Plans*, published by the Southwest Federal Regional Council in June 1975, specifically excluded employment practices of Federal contractors.[297] Thus, the Dallas FRC had no other program addressing these employers.[298]

Western

In the Western region, as in New England and the Southwest, the Federal Regional Council supported no activity directly encouraging coordination among contract compliance agencies.[299] The Council in San Francisco had considered this possibility, but regional officials of the Department of Labor expressed hesitation over supporting a regional approach to contract compliance.[300] Because of DOL's reluctance, Council members decided not to pursue it further.

C. Federal Government Employment

Although the United States Civil Service Commission is responsible for overseeing and establishing standards for equal employment opportunities within the Federal Government,[301] the Federal Regional Councils have periodically conducted activities to upgrade the internal equal employment practices of member agencies. The nature and extent of these programs have varied greatly from region to region, and they have received less Council emphasis in recent years. Recently, the Federal Regional Councils have looked instead to individual Federal agencies, the regional offices of the Civil Service Commission, or to Federal Executive Boards within their regions to carry out internal equal employment efforts.

New England

In the early 1970s, New England Council members supported a Civil Rights Team[302] which arranged for equal employment opportunity training for Federal agency personnel.[303] As of July 1974, however, the activities of this team were curtailed by the Council,[304] and no equivalent program was resumed.[305]

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[293] Friedman letter, *supra* note 192, at 5.

[294] *Id* .; King interview, *supra* note 238. According to the task force chairperson, the questionnaire's results were inconclusive.

[295] Telephone interview with Paul Sherer, Staff Director, Chicago Federal Regional Council, Jan. 30, 1976; King interview, *supra* note 244.

[296] King interview, *supra* note 238. According to the task force chairperson, rather than demonstrating an interest in substantially affecting equal employment opportunity, member agencies are primarily concerned with "doing little things that show up in the records" but which have only minor impact. *Id*.

[297] Vela interview, *supra* note 212. See also the *Southwest Guidelines* as quoted in *supra* note 251.

[298] Foreman interview, *supra* note 102; Earnhart interview, *supra* note 267. An earlier contract compliance program did appear, however, in the Council's work plan for fiscal year 1973. *Southwest FY '73 Activity Plan*, *supra* note 193, at 37–39.

[299] Otis interview, *supra* note 32; Raznick interview, *supra* note 278. See also *Western FY '76 Work Plan*, *supra* note 17.

[300] Raznick interview, *supra* note 278. The San Francisco FRC informed the Commission, through OMB, that there was an "unwillingness of DOL's national office that contract compliance programs be coordinated by the San Francisco FRC." Oaxaca letter, *supra* note 1.

[301] See *To Eliminate Employment Discrimination*, *supra* note 78, at ch. 1.

[302] Telephone interview with George Coblyn, former chairperson, New England FRC Civil Rights Team and Director of Civil Rights and Urban Affairs, Environmental Protection Agency, Aug. 27, 1974. The team primarily worked in the area of contract compliance. The contract compliance activities of that team are discussed in sec. V(B) *supra* .

[303] Prior to April 1972, there had been little equal opportunity training for Federal employees in the Boston area. Coblyn interview, *supra* note 302.

Chicago

The Chicago Council's internal equal employment opportunity program focused primarily on Federal agency affirmative action plans. Federal employment activities in fiscal year 1975 resulted in four accomplishments.[306] First, the Council's task force compiled quarterly reports on employment rates of women and minorities by Council member agencies.[307] Second, the task force reviewed the ongoing Federal employment activities of FRC agencies and the Chicago Federal Executive Board.[308] Third, an information system was developed to notify Federal employees of job opportunities in member agencies.[309] Fourth, the Council supported a program which promoted upward mobility of lower paid Federal employees, including minorities and women, by providing them with training opportunities through a cooperative agreement with Chicago's colleges and universities.[310]

However, the task force was reorganized in fiscal year 1976 to focus only on affirmative action[311] for Federal contractors and grantees. Instead of continuing past Federal employment activities, the Council suggested that the Chicago Federal Executive Board develop an internal program.[312] The FEB decided not to accept this function, and as of September 1976 the Council had not decided whether to renew its Federal affirmative action efforts.[313]

Southwest

The Federal Regional Council in Dallas did not promote internal equal employment opportunity through its programs.[314] Rather, it emphasized State and local employment[315] and, to a lesser extent, contract compliance.[316]

Western

Not since fiscal year 1974 had the San Francisco Federal Regional Council sought to influence the internal equal employment practices of member agencies.[317] The demise of the Council's program was largely due to the fact that the FRC believed that its program was duplicating similar activities of the Civil Service Commission.[318]

The earlier experience of its equal employment opportunity committee demonstrates how the Council had sought to address internal affirmative action.[319] First, the committee developed a Federal talent bank in conjunction with the FEB in San Francisco,[320] which was to be the primary source for recruiting of minority employees by Federal agencies in the San Francisco area.[321] However, few listings obtained by the talent bank were for professional positions.[322]

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[304] The former chairperson of the Civil Rights Team did not know why the team's activities were curtailed. He stated that there were few positive results from the team's active period, which had been due in part to lack of monitoring of the team's activities by the FRC. He believed that the real reason the team was curtailed was the lack of commitment of the FRC member agencies to civil rights activities. *Id.* The Council's staff director did not know why the team was disbanded. She stated that she assumed it was because the team had completed its mission. Telephone interview with Maureen E. Strickler, Staff Director, Boston Federal Regional Council, Aug. 30, 1974.

More recently, the Boston FRC has stated:

> A review of the FRC's FY '73 annual report does in fact indicate that the civil rights team had accomplished its specific mission. The report cites:
> 1)Successful completion of $44,000 FRC training contract designed to provide EEO training to key Federal, State and Municipal officials. Approximately 510 trainees participated in multi-day training sessions.
> 2)Completion of an assessment of FRC agency hiring goals and accomplishments.
> The FRC's FY '74 Work Plan states: "With the expiration of the Council's equal employment training contract monitored by the Team and the completion of the Team's assessment of FRC-agency staffing practices, all current FRC assignments have been completed. The Council has voted to retain the Civil Rights Team on a 'stand-by' basis subject to the call of the Chairman." Oaxaca letter, *supra* note .

[305] Rather, the Federal Executive Board has handled these employment questions. Hays interview, *supra* note 287; 1976 Strickler interview, *supra* note 22.

The Boston FRC noted:

> OMB FY '75 Guidance to FEBs stated that "such areas as equal employment opportunity, women's programs, training, etc., would more appropriately be handled by FEBs" than FRCs (May 9, 1976 OMB memo to FEB Chairmen). OMB FY '77 Guidance to FEBs on Work Planing (memo dated September 14, 1976) specifically tasks FEBs with Equal Employment Opportunity, including renewed emphasis on women and Spanish-speaking Americans. Oaxaca letter, *supra* note 1.

[306] Friedman letter, *supra* note 192, at 4.

[307] *Id.* See also *Chicago FY '75 Annual Report, supra* note 17, at 31.

[308] Friedman letter, *supra* note 192, at 4.

[309] *Id.* See also letter from Norman A. Erbe, Chairman, Region V Federal Regional Council, to FRC member agencies, May 1975.

[310] *Chicago FY '75 Annual Report, supra* note 17, at 34. In fiscal year 1975, approximately 300 students were enrolled in this program. *Id.*

[311] Friedman letter, *supra* note 192, at 4. See discussion of the external affirmative action program in sec. V(B) *supra*.

[312] Sherer interview, *supra* note 295; and King interview, *supra* note 238.

[313] September 1976 King interview, *supra* note 244. According to the director of the FRC's Task Force on Equal Employment Opportunity, the Council particularly recommended that the FEB devote its efforts to a centralized job information program and a minority employment report. King interview, *supra* note 238.

[314] Foreman interview, *supra* note 102; and Dehlin interview, *supra* note 212. See also *Southwest FY '76 Work Plan, supra* note 16; *Southwest FY '75 Work Plan, supra* note 17; *Southwest FY '74 Activity Plan, supra* note 106; and *Southwest FY '73 Activity Plan, supra* note 193.

[315] See discussion in sec. V(A) *supra*.

[316] See discussion in sec. V(B) *supra*.

[317] Otis interview, *supra* note 32; Raznick interview, *supra* note 278.

[318] Oaxaca letter, *supra* note 1.

[319] The Committee and its activities are generally explained in Federal Regional Council, Region IX (Western), *Fiscal Year 1974 Work Plan* 27 (1973) [hereinafter referred to as *Western FY '74 Work Plan*]; and Federal Regional Council, Region IX (Western), *Annual Work Plan May 1972-June 1973* 37-40 (Aug. 1, 1972) [hereinafter referred to as *Western FY '73 Work Plan*].

[320] *Western FY '74 Work Plan, supra* note 319, at 27.

Second, the committee recommended goals and timetables for the hiring and promotion of minorities and women in each Federal agency.[323] The goals, which were to be included in each agency's affirmative action plan, were based on a study of the employment profile of each agency from April 1972 to December 1972.[324] But the specific goals developed on the basis of this study were never adopted because the Council determined that such actions would be inconsistent with Presidential policy issued in August 1972, prohibiting quotas in Federal hiring practices.[325] It does not appear, however, that the Council's argument for failing to adopt goals and timetables is defensible. Although President Nixon's policy denounced the use of quotas, he drew a distinction between goals and quotas, and endorsed the use of goals and timetables.[326]

VI. PROGRAMS FOR PERSONS OF SPANISH ORIGIN

The Federal Regional Councils have been encouraged to address the problems of Spanish-speaking Americans on at least three different occasions.[327] The fiscal year 1976 guidelines from the Under Secretaries Group suggested that the Councils coordinate Federal efforts to assist migrants.[328] Earlier, the Cabinet Committee on Opportunities for Spanish Speaking People had encouraged some of the Councils to undertake activities for the Spanish speaking,[329] and OMB had noted in a 1972 memorandum that programs addressing the Spanish speaking could be explored as a potentially important area for Council concern.[330]

Based upon this encouragement, all four Councils examined by this Commission sponsored programs for persons of Spanish origin. These programs ranged from supporting Spanish language radio programs and newsletters, to developing a directory of federally supported medical services for migrants. On the whole, however, these programs were of limited consequence, and by fiscal year 1976, of the four Councils reviewed, only the Chicago Federal Regional Council maintained a task force specifically examining the problems of regional Spanish-speaking populations. The Southwest Council had narrowed its focus to migrants by fiscal year 1976.[331]

The Councils could clearly have undertaken more significant programs for the Spanish speaking. For example, they could have evaluated the extent to which member agencies were meeting specific needs of the Spanish-speaking population and the extent to which this group was receiving Federal assistance on a nondiscriminatory basis. The Councils also could have encouraged State and local governments to provide bilingual assistance to Spanish-speaking people to help them take full advantage of federally funded programs. Bilingual assistance is particularly important because there is good evidence to suggest that in many instances persons whose primary language is Spanish have received inadequate assistance from federally funded State and local government programs. For example, police departments have at times hired too few bilingual officers and other staff, and thus Spanish-speaking citizens often cannot communicate with police officers if they need assistance or are arrested.[332] The language barrier between Spanish-speaking patients and English-speaking medical personnel may limit access to services provided by public health facilities.[333] Spanish-speaking school children are sometimes unable to take full advantage of public education programs where bilingual services are lacking.[334] A similar need for bilingual assistance is necessary for other groups as well, including Chinese, Japanese, and Native Americans.

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[321] *Id.* Interview with Marie Davis, Personnel Specialist, FRC-FEB Federal Talent Bank, in San Francisco, Calif., Mar. 20, 1973.

[322] Davis interview, *supra* note 321.

[323] *Western FY '74 Work Plan*, *supra* note 319, at 37-38.

[324] Federal Regional Council, Region IX (Western), *Highlights of Charts on Minority and Women Hiring—Region IX* Apr. 1, 1972.

[325] President Nixon's view of quotas was expressed in a letter to Phillip E. Hoffman, president, American Jewish Committee, Aug. 11, 1972.

[326] The San Francisco Regional Council's confusion may have been due to the President's failure to provide a clear definition of the terms—goals, timetables, and quotas. In March 1973, however, the Nixon Administration defined a goal as a numerical objective related to the number of vacancies expected and the number of qualified applicants available, assuming affirmative recruitment efforts. A quota was defined as:

> The application of a fixed number or percentage of persons of a certain group that would have to be hired; the crucial consideration would be whether the mandatory numbers of persons had in fact been hired or promoted. The fixed number would have been derived from the population in the area or some other numerical base, regardless of the numbers of vacancies or the number of potential applications who would meet necessary qualifications. If the employer failed to meet the fixed requirements he would be subject to sanction. . . .Nixon letter, *supra* note 325.

The Administration's definitions of goals and quotas were set forth by Leonard Garment, Special Consultant to the President, in remarks to the Equal Opportunity Employment Officers of the Department of the Interior, Gaithersburg, Md., Mar. 21, 1973. In March 1973 four agencies (EEOC, DOJ, CSC, and DOL's Office of Federal Contract Compliance) issued a joint policy statement on employment discrimination explaining the circumstances in which numerical goals and timetables are appropriate. See "Federal Policy Remedies Concerning Equal Employment Opportunity in State and Local Personnel Systems," *supra* note 229. The Nixon letter and the four-agency agreement are discussed in detail in ch. 1 *supra*.

[327] Both migrant and Spanish-speaking programs are discussed in this section because they are often closely related. Although most Spanish-speaking Americans are not migrants, persons of Spanish origin constitute the largest single group of migrants.

[328] This portion of the guidelines is quoted in sec. III *supra*. Although a migrant component was not specifically included in the fiscal year 1975 guidelines, there was some general suggestion that the Councils in Regions IV, V, VI, VII, IX, and X coordinate migrant programs among members agencies. See Puritano memorandum, *supra* note 87.

[329] See, for example, *Southwest FY '73 Activity Plan*, *supra* note 193, at 10. CCOSSP, now defunct, was a committee whose origins date back to 1966, designed to increase the number of Spanish-speaking employees within the Federal Government and to ensure that the Spanish-speaking population received a more equitable share of Federal assistance. See U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 315-20 (1971). See also ch. 1 *supra*.

[330] Carlucci memorandum, *supra* note 84.

[331] See the discussion in the remainder of this section.

The provision of adequate assistance to non-English-speaking minorities was the subject of a court decision predicated on the requirements of Title VI of the Civil Rights Act of 1964. In January 1974 in *Lau v. Nichols*,[335] the Supreme Court affirmed lower court findings that the San Francisco public school system had failed to take steps to ensure that students of Chinese national origin, for whom English was not the primary language, could secure a meaningful education. The students, therefore, did not enjoy equal access to the benefits of federally assisted education; the Court held this to constitute a violation of Title VI.[336]

The *Lau* decision has broad implications for all assistance programs and activities funded by the Federal Government. Where language barriers hinder equal access and participation for all, a responsibility to remove or remedy such hindrances may exist.[337] Clearly, under Title VI, as interpreted in *Lau*, recipients of Federal assistance are required to provide adequate second-language assistance to ensure that persons who do not speak English are not denied meaningful participation in the federally assisted programs.

Federal Regional Councils could play an important role in ensuring that State and local governments that administer Federal funds provide second-language assistance where necessary. For example, the Councils could organize a task force:

- to identify major geographic areas where residents are in need of bilingual services;
- to determine what types of bilingual services are needed, such as translation of printed instructions or employment of bilingual staff;
- to provide a bilingual information service concerning the grant programs of member agencies; and
- to coordinate recruitment of bilingual staff for Federal, State, and local agencies.

New England

Programs for the Spanish speaking have been conspicuously missing from New England Council work plans in recent years.[338] Although the Council had earlier coordinated Spanish-speaking activities,[339] recent Federal programs for this group have been conducted by individual Federal agencies, rather than the Federal Regional Council.[340]

During fiscal year 1973, for example, the Council had four objectives with regard to persons of Spanish origin: (1) to increase awareness in Washington of the needs of New England Federal Regional Council agencies regarding the Spanish speaking; (2) to promote the Spanish linguistic abilities of Federal employees and grantees directly concerned with Spanish-speaking persons; (3) to include components for persons of Spanish origin in equal opportunity programs and affirmative action plans; and (4) to strengthen the ability to respond to requests related to the special needs of the Spanish speaking.[341] These objectives were impressive and could serve as a model for the development of goals in other regions. They are, however, no longer operational.

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[332] See *Mexican Americans and the Administration of Justice in the Southwest*, *supra* note 129.

[333] Connecticut Advisory Committee to U.S. Commission on Civil Rights, *El Boricua: The Puerto Rican Community in Bridgeport and New Haven* 10 (January 1973).

[334] U.S. Commission on Civil Rights, *A Better Chance to Learn: Bilingual-Bicultural Education* (May 1975).

[335] 414 U.S. 563 (1974).

[336] The Supreme Court found it unnecessary to reach the question whether the system's failure also constituted a violation of the Equal Protection Clause of the 14th amendment. Thus, the case does not control non-federally funded programs of State and local governments. One lower court, however, has decided a similar case on both Title VI and equal protection grounds. See Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd* 499 F.2d 1147 (10th Cir. 1974).

[337] See letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 26 Federal agencies, June 13, 1974.

[338] See *New England FY '76 Work Plan*, *supra* note 16; and *New England FY '75 Work Plan*, *supra* note 180. Of the total population for New England, 1.2 percent (or 145,535 persons) are of Spanish-speaking background, according to the 1970 census. See *Census of Population: 1970, Persons of Spanish Ancestry*, Supplementary Report PC (S1)-30, February 1973, table 1. These numbers probably are an undercount of the total population of Spanish origin in New England. See U.S. Commission on Civil Rights, *To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs* 4 (February 1973); and *Counting the Forgotten: The 1970 Census Count of Persons of Spanish Speaking Background in the United States* (April 1974) [hereinafter referred to as *Counting the Forgotten*].

[339] See *New England FY '73 Activity Plan*, *supra* note 103, work item 12. The Boston FRC noted:

> This FRC, in its early years, was very active in advocating services and opportunities for Hispanics, and the influence of those activities still is felt. These activities included establishment of a New England Spanish-Speaking Institute, sponsorship of Spanish radio programs; an immersion program of Spanish language and culture for those working with Hispanics; information, referrals, and social services for Hispanics arriving at Boston's Logan Airport; statistical studies of Hispanics in selected New England cities, and publication of a position paper that became an FRC bestseller. Even more important was the sense of aroused consciousness that permeated the Council and its member agencies. Oaxaca letter, *supra* note 1.

[340] Strickler interview, *supra* note 112.

Chicago

Because more than 750,000 Americans of Spanish origin live in Region V,[342] and there are an estimated 220,000 migrants in the Midwest,[343] the Chicago Federal Regional Council maintained a Spanish-speaking task force and a migrant task force.[344] In 1975 each task force was allocated 370 person days.[345] In 1976 the program for migrants was increased to 635 days.[346] After seriously considering disbanding the Spanish-speaking task force,[347] the Council decreased its resources to 145 person days in 1976.[348] These changes reflected the fact that problems had developed in the Spanish-speaking task force. According to the Council's fiscal year 1975 annual report, these problems included "little progress" at monthly meetings, "lack of coordination" among task force activities, and "negative responses" to attempts to create a technical assistance team to help member agencies with programs specifically designed for the Spanish speaking.[349]

The increased allocation of FRC resources for the migrant task force is commendable. It has enabled the Chicago Council to set an ambitious migrant program for fiscal year 1976, which included plans for developing a migrant rest stop in Illinois, a conference on the improvement of migrant services, and printing and distributing a revised directory of migrant services.[350]

The decrease in resources for the Spanish-speaking task force, however, was unfortunate.[351] The resources allocated originally were probably insufficient for the task force to achieve its objectives of reviewing the delivery of federally funded services to persons of Spanish origin, identifying problems in service delivery, assessing the impact of federally funded services, and making recommendations for improvement.[352] Moreover, one of the underlying causes of the lack of accomplishment by the task force was identified by the Council's staff director as an attempt to cover too much with limited resources.[353] Even if a viable program had been established, the drastic cut in resources for fiscal year 1976 would likely have precluded any substantive progress in addressing the problems of persons of Spanish origin.[354]

Southwest

The Southwest Federal Regional Council, with its central location in Dallas, had not sponsored a Spanish-speaking task force since fiscal year 1973,[355] even though 11.3 percent of the region's population is of Spanish origin.[356] However, in 1974 and 1975 the Council cosponsored with the Catholic Church minor activities to inform the general Spanish-speaking population of business and social services available through the Federal Government.[357] As in

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[341] *New England FY '73 Activity Plan, supra* note 103, work item 12.

[342] The Spanish-speaking population for Region V is 2.3 percent (757,024) of the total regional population, according to the 1970 census. See *Census of Population: 1970, Persons of Spanish Ancestry, supra* note 338.

[343] Interview with Al Moreno, Chairman, Rural Committee of the Spanish Speaking Task Force, Chicago Federal Regional Council, in Chicago, May 15, 1973. Mr. Moreno estimated that 85 percent of the migrants are Mexican Americans from Texas. *Id*. The impetus for FRC attention to the funding of migrant projects came from a USG memorandum. Carlucci memorandum, *supra* note 84. For a discussion of the conditions in which Region V migrants often live, see Indiana Advisory Committee to the U.S. Commission on Civil Rights, *Indiana Migrants: Blighted Hopes, Slighted Rights* (March 1975) [hereinafter referred to as *Indiana Migrants*].

[344] See *Chicago FY '76 Work Plan, supra* note 17, at 35, 44; *Chicago FY '75 Work Plan, supra* note 190 at 15, 19.

[345] *Chicago FY '75 Work Plan, supra* note 190, at 16, 19.

[346] *Chicago FY '76 Work Plan, supra* note 17, at 37.

[347] Friedman letter, *supra* note 192, at 7.

[348] *Chicago FY '76 Work Plan, supra* note 17, at 45.

[349] *Chicago FY '75 Annual Report, supra* note 17, at 23.

[350] *Chicago FY '76 Work Plan, supra* note 17, at 35. OMB stated:

> It is apparent that the report is directed to the deficiencies in the system rather than to a balanced picture of FRC activities. Chicago FRC, for example, provided much written documentation but the report concentrates on negative statements given by individuals over the phone or particular criticism out of a long more balanced report. Oaxaca letter *supra* note 1.

We disagree. The report does not concentrate on "negative statements given by individuals over the phone." We have included this comment here in order to contrast it with an example of our positive statements—in this case about the Chicago FRC's Migrant Task Force. This section on the Chicago FRC activities with regard to persons of Spanish origin is typical of the sections in this chapter on Chicago, as well as other FRCs. This section on Chicago uses as sources of information, the "written documentation" to which OMB refers (see note 192 *supra*), a personal interview, annual reports and work plans, as well as a telephone interview.

[351] *Chicago FY '76 Work Plan*, *supra* note 17, at 44.

[352] *Id*.

[353] Sherer interview, *supra* note 295.

[354] In the past, the task force's only significant accomplishment has been the sponsoring of a monthly bilingual newsletter—"Hispanos en Marcha" (Hispanics on the March). This newsletter continued to be distributed by the task force to agencies which provide services to persons of Spanish origin of the region. *Chicago FY '75 Annual Report, supra* note 17, at 23; *Chicago FY '74 Annual Report, supra* note 160, at 46.

[355] See *Southwest FY '76 Program Objectives, supra* note 247. Federal Regional Council, Region VI (Southwest), *Fourth Quarter (Final) Progress Reports for SWFRC* (June 24, 1975) [hereinafter referred to as *Southwest FY '75 Final Progress Report*]; *Southwest FY '74 Activity Plan, supra* note 106; and *Southwest FY '73 Activity Plan, supra* note 193.

[356] The Southwest Region's population of Spanish origin was 2,295,419, according to the 1970 census. *Census of Population: 1970, Persons of Spanish Ancestry, supra* note 338.

[357] Dehlin interview, *supra* note 212. The chairperson of the Council also

Chicago, the Spanish-speaking program gradually came to emphasize migrants,[358] and in fiscal year 1974 the program formally became the Migrant and Seasonal Farmworker Task Force, coordinating its activities with the related program in Chicago.[359]

In 1976 the major objectives of the task force were to standardize the definition of "farmworker"[360] used for the distribution of Federal assistance, expand the Migrant Student Record Transfer System,[361] enhance migrant health services and education, develop and distribute a pamphlet written in both English and Spanish which explains various laws protecting migrants, and simplify the process required for migrants to obtain food stamps.[362] As of February 1976, most of these objectives had not been met.[363] The task force apparently did not receive strong support from member agencies[364] and had accomplished less than officials of the Dallas FRC had expected.[365]

Western

A review of recent work plans for the Western Federal Regional Council revealed no specific activities to assist Spanish Americans or migrants,[366] despite the fact that nearly 30 percent of the Nation's Spanish origin population resides in this region.[367] Officials of the San Francisco Federal Regional Council knew of no Spanish-speaking activity sponsored through the Council since 1973. An effort had been made in fiscal year 1973 to make "flexible funds"[368] available to assist minorities, including the Spanish speaking.[369] In 1973, according to Council officials, the FRC funded 23 Spanish-speaking projects through cooperation with the Cabinet Committee on Opportunities for Spanish Speaking People.[370]

The Council's acting staff director also noted that California is the home of a relatively large migrant population. No related program had ever been adopted by the Council,[371] although migrants face some of the worst living conditions of any societal group in America,[372] and there have been pressing migrant problems in Region IX. For example, numerous complaints have been filed against the California Farm Labor Service by migrants,[373] and the Department of Labor's review[374] revealed that migrants in that State were indeed experiencing several types of discrimination. Generally, the acting staff director of the Council rationalized the absence

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noted that the FRC has assisted the Spanish origin population in ways that were not reflected in work plans and annual reports. He cited, as an example, assistance provided by a number of FRC agencies, including the Departments of Agriculture; Health, Education, and Welfare; Housing and Urban Development; and Labor, to the McAllen, Texas, school system in developing an effective hot lunch program for needy Spanish speaking children. Foreman interview, *supra* note 102.

[358] Telephone interview with William Cecil, Secretarial Representative to the Southwest Federal Regional Council, from the Department of Labor, Feb. 5, 1976. According to an OMB official, this trend toward migrants and away from the general Spanish population was not at the suggestion of the Under Secretaries Group or OMB. Puritano interview, *supra* note 15.

[359] The task force has attempted to coordinate its activities with any related FRC programs in Denver, Kansas City, San Francisco, and Seattle. Cecil interview, *supra* note 358.

[360] The 1976 work plan for the Council defined a migratory farm laborer as "a worker whose principal income is earned from temporary farm employment and who in the course of a year's work moves one or more times, often through several states." *Southwest FY '76 Work Plan, supra* note 17, at 82. However, Council agencies continued to use their own definitions of a "farmworker," and to distribute funds accordingly. Although the task force had recommended a standard definition to the Council, by February 1976 no action had been taken toward its adoption. Telephone interview with Paul Milan, Vice Chairman, Southwest Federal Regional Council Task Force on Migrants, Feb. 9, 1976.

[361] The Migrant Student Record Transfer System was designed to facilitate the transfer of student records within the Southwest region, thereby allowing migrant children to change schools without unreasonable loss of school credits. Milan interview, *supra* note 360. As of February 1976, the task force was seeking to extend this transfer system to health records, but the Council had taken no action. *Id*.

[362] *Southwest FY '76 Program Objectives, supra* note 247, at 62.

[363] An exception was in the area of continuity in health services. In June 1974 the Southwest FRC published a medical service directory for the Dallas and Chicago regions which explains where migrants may receive medical assistance in those regions. Milan interview, *supra* note 360.

[364] *Id*.

[365] Milan interview, *supra* note 360; Cecil interview, *supra* note 358; Foreman interview, *supra* note 102.

[366] See *Western FY '76 Work Plan, supra* note 17; *Western FY '75 Work Plan, supra* note 199; *Western FY '74 Work Plan, supra* note 319.

[367] Approximately 2.7 million persons, or more than 10 percent of that region's population, are of Spanish origin. *Census of Population: 1970, Persons of Spanish Ancestry, supra* note 338.

[368] "Flexible funds" were Federal and city funds provided through the San Francisco mayor's office for establishing innovative procedures for setting priorities and improving coordination among San Francisco's local programs. *Western FY '73 Work Plan, supra* note 319, at 27.

[369] Raznick interview, *supra* note 278. Although the 1973 work plan called for support of a "San Francisco Flexible Funding Project," no specific mention was made of Spanish Americans or minorities generally. The objective of the project was stated to:

> Enable the mayor's office to establish new procedures and administrative arrangements for setting priorities within and among key policy areas (housing, transportation, community services, education, economic development, and manpower); broaden coordination among essential local programs with key metropolitan agencies; and develop more effective citizen involvement in determining priorities. *Western FY '73 Work Plan, supra* note 319, at 27.

[370] The San Francisco FRC has stated that "The WFRC, as of January 1973, funded 23 Spanish-speaking projects in the amount of $853,000 as part of the CCOSSP effort." Oaxaca letter, *supra* note 1.

[371] Raznick interview, *supra* note 278. He explained that the Department of Labor's representatives to the Council had studied the problems of migrants within the region for possible inclusion in the fiscal year 1975 work plan, but that Council dropped the idea when DOL's study did not demonstrate a pressing need for a migrant program.

[372] See, e.g., *Indiana Migrants, supra* note 343; Iowa Advisory Committee to the U.S. Commission on Civil Rights, *Que Lejos Hemos Venido? How Far Have We Come*? (June 1976).

[373] See *To Extend Federal Financial Assistance, supra* note 78, at 448–52.

[374] U.S. Department of Labor, Manpower Administration, Special Review Staff, *Review of the Rural Manpower Service* (1972). See also Donald Janson, "Many Farm Labor Offices in Nation Favoring Growers," *N.Y. Times*, Oct. 3, 1971, p. 1, col. 5; Philip Shabecoff, "U.S. Farm Agency Reported to Foster Abuse of Migrants," *N.Y. Times*, Apr. 23, 1972, A-1, col. 1; "Labor Department Finds Discrimination in Own Agency," *Wash. Post*, Apr. 23, 1972, A-7, col. 1.

of either a Spanish-speaking or a migrant task force for the Western Region on the grounds that the basic function of the Federal Regional Council is to improve intergovernmental relations and the coordination of Federal services to State and local governments and not specifically to assist needy groups.[375] However, there are clear needs for bilingual services to facilitate the operation of federally assisted programs, and the Council's responsibility for interagency coordination makes it the most logical source for promoting cooperative Federal efforts in this area.[376]

VII. PROGRAMS FOR NATIVE AMERICANS

In fiscal year 1976 the Under Secretaries Group provided guidelines to the Federal Regional Councils suggesting that the Councils develop programs in a wide range of areas,[377] one of which was assistance to Indian reservation tribes.[378] Specifically, the Councils were encouraged to coordinate Native American programs with those of the Departments of the Interior and Health, Education, and Welfare.[379] The Councils were further asked to increase the ability of tribes to plan and manage their own activities.[380]

However, these USG guidelines were issued years after Native American programs had already been initiated by several Federal Regional Councils.[381] Of the four Councils examined by the Commission, Native American projects were initiated as early as fiscal year 1973.[382] Since then each of the four FRCs has maintained some type of activity to assist Native Americans, a group which traditionally has experienced serious problems with Federal services and assistance.[383]

New England

In fiscal year 1973 the Federal Regional Council in Boston sponsored an interagency group consisting of Federal agency staff with particular responsibilities for programs affecting Native Americans.[384] The group, called the Indian Task Force, has met regularly since its creation.[385] As of January 1976, the task force consisted of nine representatives from New England tribes or tribal organizations and nine members from Federal agencies, cochaired by a Native American and a Federal official.[386]

The mandate of the Indian Task Force in 1976 was twofold: to expedite the resolution of problems between Native Americans and the Federal Government and to cultivate better ties between Indian grantees and Federal agencies.[387] During fiscal year 1975, the New England Indian Task Force spent much of its time examining the question of Federal recognition.[388]

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[375] Raznick interview *supra* note 278. The San Francisco FRC noted:

> This statement was made for purposes of illustration. The WFRC has long determined that its main clients are units of government. We have not been unwilling to react to those in need; but the mechanism must be through units of State or local government and in the context of existing program authorities. Oaxaca letter, *supra* note 1.

[376] Through OMB, the San Francisco FRC has stated the following concerning its fiscal year 1977 migrant activities: "In FY 1975, it was determined that there was little the Federal agencies could accomplish without active State participation. That participation, only recently available, is a key ingredient in our FY 1977 activity." *Id*.

[377] See the discussion in sec. I *supra*.

[378] *FY 1976 FRC Guidelines, supra* note 12, at 8.

[379] *Id*.

[380] *Id*.

[381] See discussion in sec. III *supra*.

[382] See, for example, *Chicago FY '73 Work Plan supra* note 114, item P.

[383] See, e.g., Maine Advisory Committee to the U.S. Commission on Civil Rights, *Federal and State Services and the Maine Indian* (December 1974) [hereinafter referred to as *Federal and State Services and the Maine Indian*]. For other problems faced by Native Americans see U.S. Commission on Civil Rights, *The Southwest Indian Report* (May 1973); Montana Advisory Committee to the U.S. Commission on Civil Rights, *Employment Practices in Montana: The Effects on American Indians and Women* (August 1974); and Minnesota Advisory Committee to the U.S. Commission on Civil Rights, *Bridging the Gap : The Twin Cities Native American Community* (January 1975).

[384] *New England FY '73 Activity Plan, supra* note 103, at item 9. According to the 1970 census, 10,872 persons in New England, or 0.1 percent of the region's entire population, is Native American. *Census of Population: 1970 General Population Characteristics* , Final Report PC(1)-B1 (United States Summary), Table 60. However, the New England FRC has taken the position that the total number of Native Americans in the region may be twice the census figure. According to the Council:

> No one knows for sure how many Indians are currently living in New England. Some tribes have long kept accurate records of their membership. Others have never had what they consider an adequate census. Federal census figures are almost certainly low. One incomplete survey in Aroostook County, Maine, found at least 50% more Indian people than had been counted in 1970. The divergence may be even greater in more urbanized areas. Taking the Federal figures as a minimum, one might estimate that there are between 10,000 and 20,000 Native Americans in the Region. Federal Regional Council of New England, "FRC-Indian Task Force Position on the Federal Recognition Question," Feb. 4, 1975, at 2.

[385] *New England FY '76 Work Plan* , *supra* note 16, at 36.

[386] *Id* . Telephone interview with Gregory P. Buesing, coordinator, New England Federal Regional Council Indian Task Force, Jan. 29, 1976.

[387] *New England FY '76 Work Plan, supra* note 16, at 36. For discussions of earlier FRC activities with respect to Native Americans see, e.g., *New England FY '75 Work Plan, supra* note 180, at 57–58; *New England FY '73 Activity Plan, supra* note 103. For the types of problems plaguing New England Indians see, *Federal and State Services and the Maine Indian, supra* note 383.

[388] A federally recognized tribe has statutory entitlement to benefits, services, and protections from the Federal Government. However, Native Americans of the New England region have traditionally been denied such recognition. The reasons for this discrimination have been explained by the New England Council in the following terms:

> Initially this exclusion was motivated by the desire of State and private land speculators to circumvent Federal protection of Indian land. More recently, it has been motivated by the desire of Federal administrative officials to hold the line on Federal spending. The early exclusions were based on the theory that Indians within the original States were not subject to Federal control. The more recent exclusions have been based on the theory that Federal benefits are

As a result of this effort, in February 1975 the Federal Regional Council recommended that: (1) the Secretaries of the Departments of the Interior and Health, Education, and Welfare abandon traditional recognition standards in determining whether to provide Federal services to New England Indians; and (2) Federal agencies should increase their budgetary requests to cover Federal Indian services to Native Americans of New England, without reducing services already provided to other tribes.[389] In June 1975 the chairperson of the New England Council wrote to the Under Secretaries Group pointing out apparent contradictions in Federal policy concerning recognition of Native American tribes and requested that USG conduct a national level review of the issue. The Council attached a copy of its recommendations.[390]

After 2 months, the Under Secretaries Group provided an "interim reply" which noted that the Department of the Interior had policymaking authority on the recognition issue and the Council's future questions should be addressed to that Department.[391] After a response from Interior and a review of that response by the Council, the USG said it was willing to "discuss the possibility"[392] of placing the issue on its future agenda. The interim letter also expressed a "hope [that] the FRC will not inadvertently raise unrealistic expectations among the Tribes it is dealing with on the timing and substance of possible policy changes."[393]

This response was followed 5 months later by a letter from OMB that reaffirmed the USG position and enclosed attachments discussing eligibility requirements for New England tribes to receive assistance from several Federal agencies.[394] Neither, however, was considered by members of the New England Council to provide a final resolution of the issue because both letters were signed by officials in their OMB, not USG, capacities.[395] Thus, the Council expected to pursue the question further.[396] Clearly, the Council took a firm and progressive stance to end past funding inequities concerning the region's Native Americans.[397]

The Indian Task Force also devoted some time in areas other than Federal recognition. Generally speaking, the task force has acted as an ombudsperson in helping Indian tribes find funds.[398] During 3 days in June 1975, it held an Indian development seminar consisting of a variety of workshops to help Native Americans determine and evaluate their needs.[399] The task force also performed a liaison role between New England Indian groups and various governmental units.[400]

Chicago

The Federal Regional Council for Region V maintained an Indian committee for several years.[401]

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intended only for officially "recognized" tribes. "FRC-Indian Task Force Position on the Federal Recognition Question," *supra* note 384, at 5. See also National Council on Indian Opportunity, "A Study of Federal Indian Domestic Assistance Programs (FIDAP)" (February 1974).

[389] "FRC-Indian Task Force Position on the Federal Recognition Question," *supra* note 384, at 8.

[390] Letter from David W. Hays, Chairman, Region I, Federal Regional Council, to Paul H. O'Neill, Chairman, Under Secretaries Group for Regional Operations, OMB, June 2, 1975. For example, Mr. Hays pointed out that the Penobscot Tribe of Maine had applied for DOT funds, through the State, in order to add to the reservation's road system and that the Department of the Interior refused to approve the grant because the Penobscot tribe was not federally recognized. Mr. Hays questioned the validity of the decision since, as he noted, "The legislation which provides funds for roads on reservations (Federal Highway Amendments of 1974, Section 102) does not restrict funds only to Federally Recognized tribes." *Id.*

[391] Letter from Paul H. O'Neill, Deputy Director, OMB, to David W. Hays, Chairman, Region I, Federal Regional Council, Aug. 6, 1975.

[392] *Id.*

[393] *Id.*

[394] Letter from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to David W. Hays, Chairman, Region I, Federal Regional Council, Jan. 7, 1976. This letter contained attachments from the Department of Transportation, the Law Enforcement Assistance Administration, and the Department of Health, Education, and Welfare.

[395] Telephone interview with Gregory P. Buesing, coordinator, New England Federal Regional Council Indian Task Force, Apr. 5, 1976. Mr. Buesing said that he had no reason to think that USG had addressed the Federal recognition question at all, as of April 1976.

[396] *Id.* See also letter from David W. Hays, Chairman, Region I, Federal Regional Council, to Fernando Oaxaca, Associate Director for Management and Operations, OMB, Mar. 30, 1976. In this letter the FRC chairperson noted that he had received "no information" from the Department of the Interior concerning a review of the Federal recognition question nor a response to the assertions of the FRC. Therefore, he saw no change in the situation and looked forward to the USG discussing the entire question during a future meeting.

[397] In view of the Federal court decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1975), which ruled that a trust relationship exists between the Passamaquoddy Tribe and the Federal Government, some New England tribes may be receiving additional Federal services and funds in the near future. The Department of the Interior, as of May 1976, was considering the possibility of requesting additional appropriations from Congress for more Federal services for the Passamaquoddy and Penobscot tribes. Telephone interview with Ralph Reeser, Director of the Congressional and Legislative Staff, Office of Legislative Affairs, Bureau of Indian Affairs, Department of the Interior, May 11, 1976.

[398] Buesing interview, *supra* note 395. See, for example, *New England FY '75 Annual Report, supra* note 17, at F-1, where the Council explained that it continued to seek special HUD funds for Native Americans.

[399] *New England FY '75 Annual Report, supra* note 17, at F-1.

[400] *Id.* This liaison function has been performed, for example, with the Massachusetts Department of Community Affairs and the Indian Health Service of the Department of Health, Education, and Welfare. *New England FY '75 Work Plan, supra* note 180, at 59, 61.

[401] See, e.g., *Chicago FY '75 Annual Report, supra* note 17, at 32; *Chicago FY '74 Annual Report, supra* note 160, at 33; *Chicago FY '72 Annual Report, supra* note 105, at 24. A total of 74,106 Native Americans reside in the Chicago region. This figure is equivalent to 0.2 percent of the region's

For fiscal year 1976 the committee's goal was to improve the governmental planning and management capabilities of three regional tribes.[402] For fiscal year 1975 the committee's objective was to create and maintain "an on-going mechanism"[403] responsible for increasing the Council's responsiveness to Native Americans. For fiscal year 1974 the committee's main purpose was "[t]o improve services and opportunities for Indian people throughout the Region."[404]

During fiscal year 1976 the committee's objective was to review plans of three tribes for using Federal assistance and then seek to coordinate assistance to these tribes from Federal agencies, including nutrition programs by HEW and housing programs by HUD.[405] Acting as an intermediary, the FRC wanted to improve the flow of information between Native Americans and the funding agencies.[406]

Achievement of this objective, however, requires a concerted effort by all participating Federal agencies, and the committee must overcome past shortcomings, such as irregularity of meetings.[407] It must overcome, too, the weakness of its past working relationship with Native Americans of the region,[408] a problem which has lingered over the years but which has recently eased, according to the Council's staff director.[409]

Overall, however, the committee accomplished little over the years. It worked with only three tribes in 1975 and raised issues for which interagency solutions were not forthcoming.[410] Perhaps the most practical development in 1975 was the providing of lists of Native Americans to Federal agency personnel offices for purposes of possible recruitment.[411]

Southwest

Although 30 percent of all federally recognized Native Americans live within the Southwest region,[412] the Federal Regional Council in Dallas made little solid progress in its attempts to assist them. Its major effort from the early 1970s[413] through February 1976 was to set up a task force to simplify, coordinate, and monitor approximately $3.9 million in grants to the Zuni tribe, which has received funds from all member agencies of the FRC, the State of New Mexico, and the private sector.[414]

The Council's work plan for fiscal year 1974 included a program to strengthen the governmental management and planning capabilities of three selected tribes and to coordinate more efficiently the Federal services and assistance flowing to those tribes.[415] The program was further intended to identify for the tribes the Federal assistance for which they were eligible.[416] However, the FRC had been "behind schedule"[417] in accomplishing its goals with respect to Native Americans and, in fact, had fallen short of "substantive accomplishment."[418] Therefore, the Native American program for fiscal year 1975, which was not completed in that year,[419] was largely repeated in the Council's work plan for fiscal year 1976.

As of February 1976, the task force had fallen even further behind schedule.[420] Although the FRC task force had made some progress in strengthening the planning and management capabilities of the Zuni and Laguna tribes, the task force chairperson stated that other activities had failed with the Osage and Cheyenne-Arapaho tribes.[421]

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population. See *Census of Population: 1970, General Population Characteristics, supra* note 384.

[402] *Chicago FY '76 Work Plan, supra* note 17, at 17. This is an important function which should be performed by the FRC, especially in view of the survey demonstrating that less than 1 of 12 Federal grant programs have been used by 2 or more tribes. See *Chicago FY '75 Work Plan, supra* note 190, at 29.

[403] *Chicago FY '75 Work Plan, supra* note 190, at 29.

[404] *Chicago FY '74 Annual Report, supra* note 160, at 33.

[405] *Chicago FY '76 Work Plan, supra* note 17, at 17.

[406] *Id.*; Friedman letter, *supra* note 192, at 8.

[407] See *Chicago FY '74 Annual Report, supra* note 160, at 33.

[408] See *Chicago FY '75 Annual Report, supra* note 17, at 33. Earlier documents from the FRC suggested the same problem. For example, the annual report for 1974 candidly concluded: "We have not been able to find an effective way of working with Indians, urban, rural and reservation. We have not been able to identify 'representative' Indian people who are able and willing to work with the FRC on behalf of Indians." *Chicago FY '74 Annual Report, supra* note 160, at 33.

[409] Sherer interview, *supra* note 295. Measuring the resolution of this problem, however, is far from simple. As the 1975 annual report noted, the Council had experienced the "difficulty of quantifying 'success' when [a] program is geared toward establishing trust and cooperation rather than specific action items." *Chicago FY '75 Annual Report, supra* note 17.

[410] *Chicago FY '75 Annual Report, supra* note 17, at 32.

[411] *Id.* Related objectives of the Committee date back to early 1973. See *Chicago FY '73 Work Plan, supra* note 114, at item P.

[412] *Southwest FY '76 Work Plan, supra* note 16, at 62. The Native American population for the region is 196,521, or 1.0 percent of the region's total population. See *Census of Population: 1970, General Population Characteristics, supra* note 384.

[413] *Southwest FY '73 Activity Plan, supra* note 193, at 25. See also *Southwest FY '74 Activity Plan, supra* note 106, at 29; Federal Regional Council, Region VI (Southwest), *Annual Report 1973–74* MBO 5 (Aug. 16, 1974).

[414] Lewis interview, *supra* note 268.

[415] *Southwest FY '74 Work Plan, supra* note 106, at 35.

[416] *Id.*

[417] Lewis interview, *supra* note 268. See also the progress report on federally recognized Indian tribe development, June 3, 1975, at 1, attached to *Southwest FY '75 Final Progress Report, supra* note 355.

[418] Progress report on federally recognized Indian tribe development, June 3, 1975, at 3, attached to *Southwest FY '75 Final Progress Report, supra* note 355.

[419] *Southwest FY '76 Work Plan, supra* note 16, at 63.

[420] Lewis interview, *supra* note 268.

[421] *Id.*

Western

An overriding goal of the Federal Regional Council in San Francisco during fiscal year 1976 was to adjust the delivery of Federal programs to enhance the ability of general purpose governments[422] to utilize Federal assistance in responding to particular community needs.[423] In pursuit of this broad objective, the FRC supported a standing committee on Indians.[424] This committee grew in importance after 1974.[425] Central to its responsibilities was the Reservation and Rural Indian Assistance Program,[426] designed to promote effective interagency and intergovernmental coordination for those tribal and Federal groups seeking to resolve problems facing several Indian governments within the Western region.[427] The Indian committee also has overseen a program[428] to ensure that Federal funds were equitably distributed among tribes.[429]

If these 1976 objectives were in fact accomplished to a substantial degree, it would suggest considerably more progress than over the past years, especially since earlier programs have been more narrow, have affected fewer tribes, and have generally been characterized by limited accomplishment. To be effective, the Indian committee must overcome past difficulties encountered by the preceding task force—including sporadic participation by Federal agencies, a lack of credibility on the part of the task force, organizational difficulties, and largely unsuccessful attempts to secure Federal resources for Western Native Americans.[430]

According to officials of the Council, these problems were being solved largely because of the committee's new status[431] and a much higher rate of agency participation. The committee has maintained an "open door policy" which encouraged tribal leaders to meet personally with members and to place items on the committee's agenda, thereby increasing constructive interaction and improving the committee's credibility.[432]

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[422] The term "general purpose government" refers here to States, counties, cities, councils of government, and Indian reservations. *Western FY '76 Work Plan, supra* note 17, at 8.

[423] *Id*.

[424] *Id* at 12. The 1970 census sets the Native American population of Region IX—which includes Arizona, California, Hawaii, and Nevada—at 195,889, or 0.9 percent of the total population. *Census of Population: 1970. General Population Characteristics, supra* note 384. However, this number is said to constitute more than 60 percent of all Native Americans in the United States. Livingston interview, *supra* note 52.

[425] Livingston interview, *supra* note 52. As of May 1975, the former Indian Task Force became a full standing committee. The distinction is important. It reflects a growth in the relative significance of Native American problems as viewed by the Council.

[426] *Id*. The Reservation and Rural Indian Assistance Program was an extension of past San Francisco FRC activities to assist Native Americans in the region. See also *Western FY '75 Work Plan, supra* note 199, at 14, where that year's objectives were stated more narrowly: "To complete by February 1975 the review of planning efforts of the San Carlos, White Mountain, and Duck Valley Tribes to complete a review of problems and issues facing Indians in California and continue to address the planning efforts of the eight tribes previously reviewed with a broader planning and capacity-building focus." However, in an attempt to broaden its impact, the Indian Task Force planned to emphasize capacity building and planning assistance in the latter portion of fiscal year 1975. See *Id.* For earlier developments in this general program see *Western FY '74 Work Plan, supra* note 319, at 14.

[427] *Western FY '76 Work Plan, supra* note 17, at 12. This objective included improvements in information dissemination and ad hoc assistance in response to specific requests to the FRC from different tribes. *Id*.

[428] *Id*. at 13.

[429] Livington interview, *supra* note 2.

[430] See *Western FY' 75 Annual Report, supra* note 17.

[431] Livington interview, *supra* note 52. For discussion of the committee's new status see note 426 *supra*.

[432] Livingston interview, *supra* note 52.

Chapter 4

FEDERAL EXECUTIVE BOARDS (FEBs)

I. RESPONSIBILITIES

A. Historical Background

Federal Executive Boards (FEBs) are voluntary associations of top regional Federal executives in various cities across the country.[1] They were established in 10 cities[2] by President Kennedy in November 1961[3] to convey Presidential policies directly to Federal agency field offices and to assure their implementation.[4] During the Nixon administration, FEBs were directed to assume responsibility for supporting Presidential programs at the local level through implementation of major national themes.[5] FEBs were also directed to improve the responsiveness and effectiveness of the Federal Government at the local level by increasing interagency coordination.[6] As of March 30, 1976, there were 26 FEBs (See map). Under the Ford administration they were encouraged to "set an example in such areas of critical concern as improvement of management of resources in limited or short supply, encouragement of energy efficiency, productivity, and the restoration of confidence in government."[7]

FEBs are separate and distinct organizations from the Federal Regional Councils, which were originally the Critical Urban Problems Committees of the FEBs but were granted autonomy and redefined in 1969.[8] FEB membership is composed of representatives from every Federal agency within the FEB locality. FRC membership is limited to representatives from the 11 grantmaking Federal agencies. The FEB scope of program activity is metropolitan, while the FRC scope is regional. The FEBs' purpose is to improve internal Federal management and render services to the community at the particular FEB location, and the purpose of the FRCs is to improve program coordination of the 11 grantmaking Federal agencies.[9] Some FRC members are also members of the FEBs, but this occurs only where both organizations are located in the same city.

FEB authority is limited to member agencies using their combined resources, for example, for projects in personnel management or public relations, which individual member agencies could not afford to support alone. The FEBs have no independent authority. To effect their programs, they depend

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[1] The participation of members in FEB meetings and activities was accomplished on a part-time basis. With the exception of the chairperson's executive assistant and secretary who were full-time, all FEB members participated voluntarily. Their efforts were separate and distinct from their day-to-day, full-time employment responsibilities in the various Federal agencies in the FEB locality.

[2] The first Federal Executive Boards were established in Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Dallas, Tex.; Denver, Colo.; New York, N.Y.; Philadelphia, Pa.; San Francisco, Calif.; Seattle, Wash.; and St. Louis, Mo.

[3] Memorandum from President John F. Kennedy to Heads of Departments and Agencies, Nov. 10, 1961 [hereinafter referred to as Kennedy memorandum].

[4] The areas of responsibility of the FEBs were revised several times since their creation. Initially the FEBs were assigned four broad areas: (1) liaison between Washington and agency heads in the field, (2) management improvement and cost reduction, (3) improvement of relations between State and local governments, and (4) the identification and referral of problems to Washington. Following the 1965 riots in the Watts section of Los Angeles, the focus of the FEBs was redirected to include identifying urban needs, devising and implementing interagency and intergovernmental efforts to solve critical problems, and improving coordination among Federal programs affecting metropolitan areas. In 1969 the Federal Regional Councils were established to coordinate grantmaking activities of Federal agencies. (See ch. 3, The Federal Regional Councils, *supra*.) At that time the FEBs' function was redefined to concentrate on the implementation of Government-wide policy, the improvement of Federal service and management, and Federal participation in community service activities. Joint study by the Bureau of the Budget and the U.S. Civil Service Commission, "Evaluation of Federal Executive Boards," 7-10 (July 1969) [hereinafter referred to as Joint Study] and memorandum from President Nixon to Robert P. Mayo, Director, Bureau of the Budget, Aug. 31, 1969, [hereinafter referred to as Nixon memorandum] implementing the recommendations of the joint study.

[5] Memorandum from George P. Shultz, Director, OMB, to President Richard M. Nixon, "Federal Executive Boards, Fiscal Year 1971 Annual Report," Dec. 10, 1971. The development of national objectives is discussed in sec. II *infra*.

[6] Memorandum from Arnold Weber, Associate Director, OMB, to FEB chairpersons, Mar. 18, 1971.

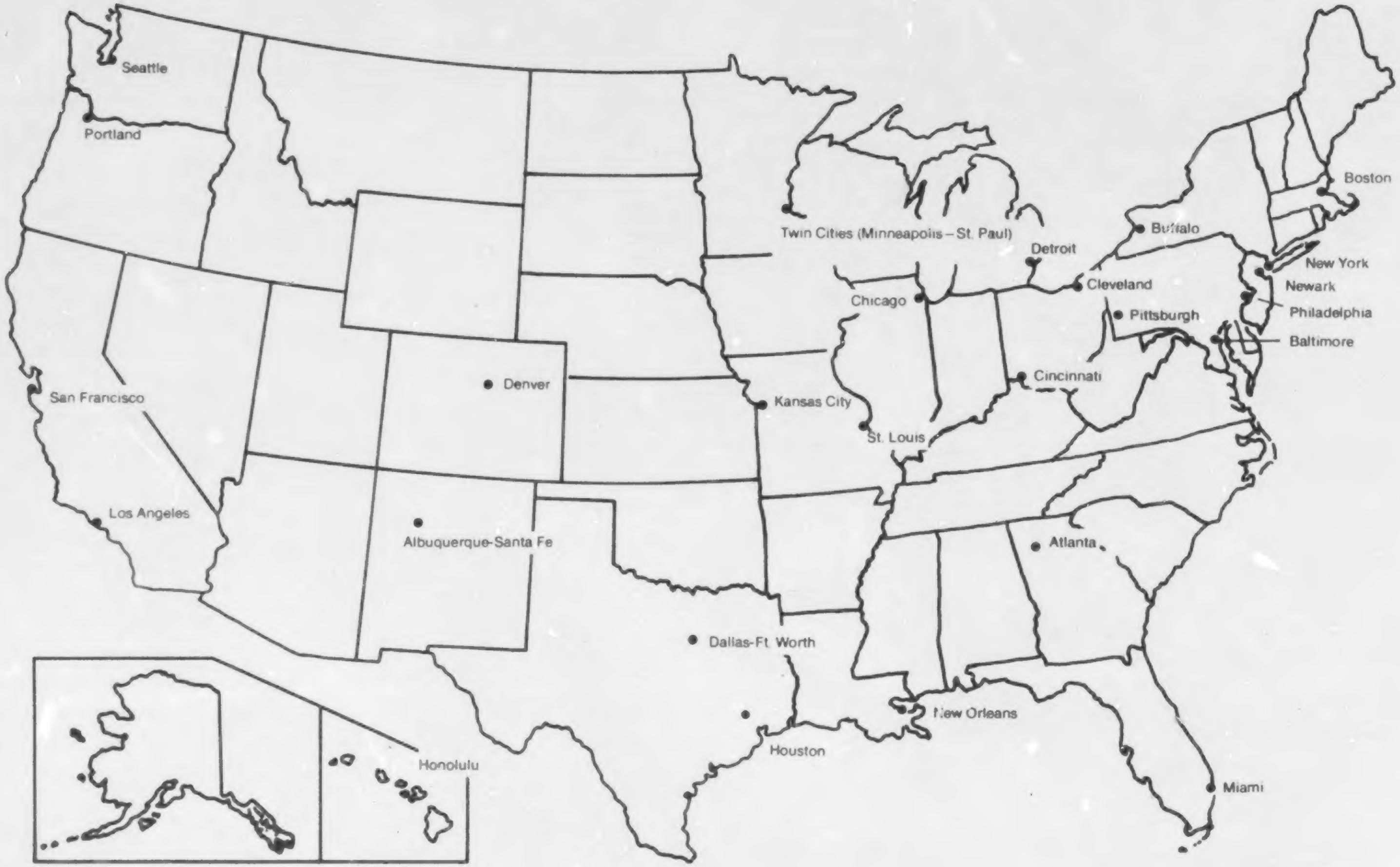
[7] Memorandum from President Gerald R. Ford to Heads of Departments and Agencies, transmitting the 13th Annual FEB Report, Mar. 21, 1975.

[8] Nixon memorandum, *supra* note 4.

[9] Exec. Order No. 11647, 3 C.F.R. 371 (1973). The Federal Regional Councils are discussed at length in ch. 3 *supra*.

Exhibit 4.1

Federal Executive Board Locations


Seattle
Portland
San Francisco
Los Angeles
Denver
Albuquerque-Santa Fe
Dallas-Ft. Worth
Houston
Honolulu
Twin Cities (Minneapolis – St. Paul)
Kansas City
St. Louis
Chicago
Detroit
Cincinnati
New Orleans
Atlanta
Miami
Buffalo
Cleveland
Pittsburgh
Boston
New York
Newark
Philadelphia
Baltimore

upon the voluntary cooperation of their members and guidance from lead agencies,[10] as well as encouragement from the Office of Management and Budget (OMB) within the Executive Office of the President.

During fiscal year 1973 Commission staff conducted extensive interviews with FEB officials in Boston, Chicago, Dallas, New Orleans, and San Francisco. The following analysis will focus primarily on those FEBs.[11]

B. Role of the Office of Management and Budget in Establishing FEB Program Responsibilities

In 1969, after 8 years existence under the leadership of the Civil Service Commission and the Bureau of the Budget,[12] a joint evaluation by both agencies recommended that the FEBs be reorganized internally and transferred to the exclusive jurisdiction of the Budget Bureau.[13] The transfer was effected[14] to "inter-relate"[15] the FEBs to other field coordinating mechanisms under the jurisdiction of the Bureau.[16] OMB, which replaced the Bureau of the Budget, continues to exercise guidance and coordinative functions with regard to FEBs. The Intergovernmental Relations and Regional Operations Division (IRRO) within OMB has direct responsibility for FEBs[17] IRRO carries out this responsibility by issuing guidance, periodically evaluating the performance of FEBs, and maintaining contact with FEB officials through Washington-based "field representatives."[18]

OMB develops policy directives for FEBs by combining input from the White House, FEBs, lead agencies, and OMB staff.[19] In suggesting national objectives for FEBs, IRRO considers various elements, including White House interest, assessments by FEB chairpersons, lead agency assessments of FEB performance, FEB annual reports and work plans,[20] and OMB staff assessments.[21] For fiscal year 1976, national objectives developed for FEBs were (1) enhancing minority business opportunities, (2) assisting the elderly, (3) improving productivity, (4) conserving energy, and (5) enhancing personnel management programs, including equal employment opportunity programs, Federal women's programs, and employment of the handicapped and veterans.[22] OMB commented:

> *Predominance of civil rights related objectives* . The Chapter ignores emphasis placed on civil rights-related activities or mentions without comment what to us is significant fact. For example, the Chapter notes the five prime FEB objective areas—minority business, assisting the elderly, productivity, conserving energy, and personnel management (including EEO, Federal Women's programs, Spanish-speaking programs, and employment of the handicapped and veterans). *Three of the five* areas of national FEB emphasis are programs the Commission itself has chosen to critique as within its purview. We do not believe FEBs need apologize for work in energy conservation and increasing Federal productivity, matters of national concern to all citizens including minorities and the disadvantaged. The three other national areas are civil rights-related, and although we attach no magic

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[10] Lead agencies exercised primary responsibility for developing FEB programs. They conceptualized and designed programs for FEBs to implement. For example, the Civil Service Commission was the lead agency for equal employment opportunity programs of the FEBs, and the Office of Minority Business Enterprise of the Department of Commerce was the lead agency for minority business opportunity programs. These programs are discussed in sec. III *infra* . OMB stated that, "[This] footnote on lead agency responsibility accurately describes their input." Letter from Fernando Oaxaca, Associate Director for Management and Operations, Office of Management and Budget, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Dec. 21, 1976 [hereinafter referred to as Oaxaca letter].

[11] OMB stated, "The FEBs indicate that some of the errors made may be due to the fact that the Civil Rights Commission depended heavily on telephone interviews—a notoriously inadequate survey method." *Id* .

Among the first steps in conducting the research for this chapter were lengthy personal interviews with FEB officials, executive assistants, and committee members and staff in Boston, Chicago, Dallas-Fort Worth, New Orleans, and San Francisco. Subsequently, numerous telephone inquiries were made to executive assistants and committee staff members to supplement or update the original information obtained. In addition, Commission staff relied on many documents, including the annual reports and work plans of the five FEBs covered in this chapter.

[12] The Bureau of the Budget was reorganized and designated Office of Management and Budget in July 1970. For a discussion of this reorganization, see ch 2, sec. I *supra* .

[13] Joint Study, *supra* note 4.

[14] The transfer was effected by the Nixon memorandum, *supra* note 4.

[15] Joint Study, *supra* note 4, at 3.

[16] Included under the Bureau in 1969 were temporary regional bodies which were permanently established in 1973 as Federal Regional Councils, *supra* note 4. These are discussed in ch. 3 *supra* .

[17] OMB, Statement of Functional Responsibilities of the Intergovernmental Relations and Regional Operations Division (undated).

[18] Field representatives are discussed *infra* this section.

[19] Interview with Charles B. Hughes, Chief, Intergovernmental Relations Branch, Intergovernmental Relations and Regional Operations Division, OMB, Jan. 21, 1976 [hereinafter referred to as January 1976 Hughes interview].

[20] FEB annual reports listed activities by specific committee and indicated whether a particular objective or sub-objective was accomplished during the fiscal year. Work plans projected the activities of the FEB committees for the next fiscal year.

[21] OMB emphasized that "[N]ational objectives are not developed solely by OMB, but are the result of lead agency suggestions which have been cleared with FEBs." Oaxaca letter, *supra* note 10.

[22] Memorandum from Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, to FEB chairpersons, "FY 1976 FEB Objectives and Reporting Requirements," July 7, 1975. Committee activities are discussed further in sec. III *infra* .

> to the 60% figure (we are willing to entertain agency proposals to make it even higher as noted below), we are frankly quizzical about why the Commission ignores this basic fact. . . .
>
> *Future civil rights actions in respect to FEBs.* Despite the fact that 60% of the FEB national objectives are civil rights-related, we are more than willing to do even more. The Commission report, changed as necessary to be more accurate, is very useful in this respect. We will circulate the report's conclusions about the FEB system to Washington agency headquarters and, in accordance with the lead agency concept, will invite ideas for new agency initiatives with FEBs that may promote civil rights. Any agency ideas will be circulated to the FEBs for their reaction, and depending upon this FEB reaction, we will be happy to transmit additional objectives to the field.[23]

In this chapter, the Commission has attempted to assess fairly the capabilities and limitations of the FEBs for assisting the Federal effort to end discrimination against minorities and women.[24] The Commission has attempted to report accurately what FEBs do and do not do to assist that effort. The chapter contains many references to FEB objectives and activities which pertain to the rights of minorities and women. While it is clear that civil rights activities have been emphasized by the FEB system, we believe that OMB overstates this emphasis in its representation that 60 percent of the FEB's national objectives "are programs the Commission itself has chosen to critique within its purview."[25] We are, of course, pleased that OMB will circulate this chapter throughout the FEB system and invite ideas which may promote civil rights. We hope that the findings, conclusions, and recommendations of this report will be helpful to FEBs' contribution to the Federal civil rights enforcement effort.

OMB deemphasized its authority over FEBs, however, and characterized its role as "leadership with a soft glove" and the relationship between OMB and FEBs as one of "mutual accommodation."[26] The director of IRRO, while emphasizing that OMB has no authority over FEBs, acknowledged that OMB imposed such requirements as submitting annual reports and work plans.[27] Although there is no directive stating that FEBs must follow OMB guidance, no FEB has ever questioned an OMB requirement.[28] In fact, as will be discussed below, FEBs took little initiative for their own program direction outside the national objectives other than to participate in local activities such as blood drives and fundraising campaigns.[29]

In December 1976, OMB wrote the following assertions about OMB's role:

> 1. OMB, as reported, has no authority over FEBs.
>
> 2. Washington provides *guidance* to FEBs. . .and the guidance comes from lead agencies who on their initiative take advantage of the FEB forum to implement portions of the agencies'. . .programs requiring interagency cooperation.

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[23] Oaxaca letter, *supra* note 10.

[24] It has been established practice that the Commission has not dealt with specialized issues, such as age or handicap, because it has not felt that it should broaden its activities and utilize funds appropriated for traditional civil rights purposes. For example, the Commission has been importuned on many occasions to unilaterally assume jurisdiction in the area of age discrimination and discrimination on the basis of a handicap. The Commission has always rejected such requests for the reasons suggested above. Recently, the Congress pursuant to the 1975 amendments to the Older Americans Act required the Commission to study the problems of "unreasonable discrimination" on account of age. The Congress, however, on that occasion authorized the appropriation of funds to conduct that study which would be separate and apart from the funds authorized for our traditional responsibilities.

[25] Oaxaca letter, *supra* note 10. Although OMB commented that 60 percent of the FEB's national objectives were programs within the purview of this report, minority business enterprise was the only FEB national objective which we viewed as falling within the specific concern of this report. The chapter does report on FEB activities with regard to the elderly, but our purpose in mentioning these activities is not to evaluate their overall effectiveness, but rather to assess the extent they incorporate attention to the needs of minorities and women. We have evaluated FEB activities with regard to the elderly in the same way that we have evaluated FEB consumer and fundraising activities. The chapter does not evaluate FEB personnel management activities, *per se*. In fiscal year 1976, the FEB personnel management objective encompassed seven areas: equal employment opportunity, employment of the handicapped, labor-management relations, employment of veterans, productivity, cost effectiveness, and organizational effectiveness. The only one of those seven areas evaluated in this chapter is equal employment opportunity.

[26] Interview with Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Regional Operations, OMB, Feb. 13, 1976, [hereinafter referred to as Puritano interview].

[27] *Id.*

[28] *Id*. Mr. Puritano stated that he was not certain what OMB would do if any FEB ever questioned an OMB directive or request. "OMB requests (not imposes on) FEBs to submit annual reports and work plans. . .mention of FEB adherence to OMB requirements would be better stated as FEB adherence to OMB *guidance*." Oaxaca letter, *supra* note 10.
This Commission notes, however, that the impression created by OMB was that submission of reports was required. The title of the 1975 memorandum informing the FEBs of the format and due dates for their annual reports and work plans was "FY 1976 FEB Objectives and Reporting Requirements." See *supra* note 22.

[29] Fund raising activities are briefly discussed in sec. III(D) *infra*. The Boston FEB noted that, "FEBs operate with considerable local autonomy in developing local policy initiatives and determining how nationally mandated programs will be implemented to suit local needs and local capabilities." Oaxaca letter, *supra* note 10.

> 3. OMB provides a secretariat role in transmitting [lead] *agency* guidance and ensures that FEBs have an input in what the guidance is.
>
> 4. FEBs are consulted on guidance before agencies issue final guidelines and agencies are alerted to FEB concerns.
>
> The consequences of these facts are that while OMB attempts by communication and persuasion to maintain and strengthen the FEB system itself (as a system), OMB does not control what the FEBs do in the Federal program areas in which the FEBs work under the lead agencies.[30]

In contrast, the introduction to the 1975 FEB Annual Report which is prepared by OMB, stated: "FEBs receive overall policy direction concerning the FEB system itself from the Office of Management and Budget in the Executive Office of the President."[31]

OMB, moreover, acted as an FEB monitor. When Federal agencies and FEBs came to OMB with a proposal for FEB involvement in an activity or program, IRRO evaluated the proposal to determine whether it would be an appropriate FEB activity. The director of IRRO informed Commission staff that this evaluation was based chiefly on whether the FEB system could handle the workload of the proposed program or activity.[32] OMB subsequently stated:

> Evaluation of proposed FEB objectives is not based chiefly on whether the FEB system can handle the workload but rather on FEB reaction to and comment on the objectives. It is misleading to generalize about the FEB workload as FEBs vary in size and capacity to undertake objectives.[33]

IRRO maintained less formal communications with FEBs through field representatives. IRRO field representatives acted principally as consultants to FEBs on management problems. Field representatives, who occasionally visited FEBs and participated in policy committee meetings, did not, however, advise FEBs on program design or priorities except on request.[34]

OMB also kept FEBs informed on activities in Washington through a regular newsletter,[35] which served, too, as a forum for communication among FEBs. The OMB newsletter usually included a lead article on matters of White House interest, reports of successful activities by FEBs and FRCs, and listings of Federal publications. Lead articles during calendar year 1975, for example, pertained to such matters as the President's State of the Union Message,[36] the role of the Domestic Council,[37] the need for improved productivity by the Federal Government,[38] resettlement of Vietnamese refugees,[39] and decreasing Federal regulation.[40]

C. FEB Civil Rights Responsibilities

FEB civil rights responsibilities were acknowledged in two Presidential memoranda and at least one OMB policy directive to the FEBs. For example, in his memorandum creating the FEBs, President Kennedy stated that an appropriate FEB concern would be protection of equal rights.[41] President Nixon, in reorganizing the FEBs under the Bureau of the Budget in 1969,[42] stated that one FEB responsibility was to further consideration of Federal enforcement of equal employment.[43] Subsequently, in 1972, an OMB guidance memorandum advised all FEBs not to participate in any activity with external private organizations practicing exclusionary discrimination.[44]

Other directives on civil rights were issued to OMB staff. OMB directors in 1971 and again in 1973 instructed OMB staff to include civil rights concerns in field coordination activities with the FEBs, as well as the FRCs.[45] Another OMB memorandum for internal staff guidance, issued in 1975, reiterated the civil rights responsibilities of OMB staff.[46] It charged the OMB Deputy Director with monitoring and coordinating overall civil rights efforts, while delegating to the Associate Director for Human and Community Affairs specific responsibility for OMB civil rights activities.[47] This memorandum identified and explained six civil rights areas to be addressed by OMB staff: (1) Federal financial assistance, (2) contract compliance, (3) equal opportunity in the Federal service, (4) fair housing and site selection, (5) minority procurement, and (6) deposits in minority-owned banks. Three of the six areas outlined in the OMB memorandum—equal opportunity in the Federal service, minority procurement, and deposits in minority banks—were addressed in guidance directives to FEBs.[48]

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[30] *Id.*

[31] Office of Management and Budget, *Federal Executive Board, 14th Annual Report, 1975* at 1.

[32] Puritano interview, *supra* note 26.

[33] Oaxaca letter, *supra* note 10.

[34] Puritano interview, *supra* note 26; January 1976 Hughes interview, *supra* note 19; and telephone interview with Hughes, Feb. 11, 1976, [hereinafter referred to as February 1976 Hughes interview]. OMB noted that "OMB field representatives will upon request interpret FEB guidance by advising FEBs on program design or priorities." Oaxaca letter, *supra* note 10.

[35] The "Newsletter For Federal Field Officials" is distributed on a monthly or bimonthly basis to FEBs and FRCs. Interview with Karen Sagett, management analyst, IRRO, OMB, Apr. 12, 1976.

[36] OMB, "Newsletter for Federal Field Officials," January 1975.

[37] *Id.*, February 1975.

[38] *Id.*, April 1975.

[39] *Id.*, September 1975.

[40] *Id.*, December 1975.

[41] Kennedy memorandum, *supra* note 3.

[42] For a description of this reorganization, see note 4 *supra*.

[43] Nixon memorandum, *supra* note 4.

[44] Memorandum from Frank C. Carlucci, Deputy Director, OMB, to FEB chairpersons, Sept. 14, 1972.

[45] OMB Office Memorandum No. 71-53 George P. Shultz, Director, OMB, to staff, "OMB Civil Rights Activities," Mar. 25, 1971, and OMB Office Memorandum No. 74-12, from Roy L. Ash, Director, OMB, to staff, "Civil Rights Activities," July 26, 1973. These memoranda are discussed more fully in ch. 2, sec. I(B) *supra*.

More importantly, OMB's Associate Director for Management and Operations, who was responsible for overseeing IRRO, indicated in late January 1976 that it was his view that FEBs do not have a civil rights responsibility because they are "not chartered to police civil rights."[49] He also stated that whether FEBs participate in civil rights activities depends on their officers, the inclination of the boards or a lead agency[50] to take the initiative, and the availability of resources.[51] This apparently passive viewpoint contrasts with earlier OMB policy directives calling for staff initiative in promoting civil rights activities by the FEBs. This attitude may have contributed to the fact that neither OMB staff[52] nor staff members of the FEBs had adequately recognized their civil rights responsibilities.

II. ORGANIZATION AND STAFFING

A. Membership

Members of the FEBs were usually the highest ranking Federal officials representing both civilian and military installations in each FEB city. The number of members varied but tended to be larger in cities which were Federal regional headquarters, such as Boston, Chicago, Dallas, and San Francisco. For example, in fiscal year 1976 there were approximately 90 members in the Boston FEB, 120 in Dallas-Fort Worth,[53] 91 in Chicago, and 125 in San Francisco, but only 44 members in New Orleans, which is not a regional headquarters city.[54] Participation by members in FEB activities was not mandatory. The average Board attendance at FEB meetings reviewed by the Commission ranged from 80 percent in New Orleans to 50 percent in Chicago.[55]

Each FEB conducted its activities through periodic meetings of the full Board, meetings of the policy committee, and meetings of permanent committees on such matters as community service, intergovernmental relations, minority business enterprise, and equal opportunity.[56] Such sizable groups of persons participating only on a voluntary, part-time basis in such a loosely structured system resulted in rather unwieldly organizations which were not conducive to effective decisionmaking. FEBs were useful, however, for disseminating information and encouraging high ranking Federal employees to become acquainted with one another.[57]

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[46] OMB Office Memorandum No. 75-54 from James T. Lynn, Director, OMB, to staff, "OMB Civil Rights Activities," May 6, 1975.

[47] Responsibility was further delegated to a branch in the Community and Veterans Affairs Division. Within that branch one person, a budget analyst, acted as the OMB civil rights advocate. For a discussion of OMB staffing, see ch. 2, sec. II *supra*.

[48] Oaxaca letter, *supra* note 10. See also memorandum from Vincent Puritano, Deputy Associate Director, Intergovernmental Relations and Regional Operations Division, OMB, to all Federal Executive Board Chairpersons, July 7, 1975. OMB stated, "Several of the other areas (e.g., Federal financial assistance, contract compliance) do not even lend themselves to the types of activities FEBs were established to undertake." Oaxaca letter, *supra* note 10.
This Commission disagrees. With regard to contract compliance, for example, FEBs could provide a useful service by promoting public acceptance of concepts central to the Federal contract compliance program, including goals and timetables, affirmative action, and the need for regular reporting of compliance information. With regard to fair housing, FEBs might establish an equal housing referral service for Federal employees with the affirmative objective of contributing to the amount of integration in the area. With regard to federally assisted programs, FEBs might provide encouragement to recipient, i.e., the non-Federal entities who operate programs with Federal assistance, to use bilingual materials and staff where appropriate. We note, moreover, that according to OMB, two of the areas which OMB apparently believes to be "inappropriate" for FEB activities—contract compliance and fair housing—have been addressed by the Boston FEB. OMB also stated, "The Boston FEB, independently, adopted two additional programs—Contract Compliance (FY 72-74) and Fair Housing (FY 73). The sixth area, Financial Assistance, has no relevance to FEBs." *Id*.

[49] Interview with Fernando Oaxaca, Associate Director for Management and Operations, OMB, Jan. 27, 1976.

[50] *Id*. For a brief discussion of the lead agency concept, see note 10 *supra*.

[51] Oaxaca interview, *supra* note 49.

[52] OMB's civil rights role is discussed in ch. 2 *supra*.

[53] Oaxaca letter, *supra* note 10.

[54] Telephone interviews with executive assistants to FEB chairpersons: Carol Morrison, Chicago; Felix Bethancourt, New Orleans, Feb. 6, 1976; and Cynthia Gray, San Francisco, Feb. 9, 1975. On Feb. 6, 1976, Commission staff also spoke with the following executive assistants to FEB chairpersons: Frank Prout, Boston, and Elizabeth Canfield, Dallas-Fort Worth [hereinafter referred to as Prout *et al.* interviews].

[55] *Id*.

[56] Prout *et al*. interviews, *supra* note 54. These committees are discussed at greater length in sec. III *infra*.

[57] This view is shared by some OMB officials. January 1976 Hughes interview, *supra* note 19; and interview with Paul H. O'Neill Deputy Director, OMB, Mar. 4, 1976.

B. Meetings

The frequency of full Board meetings varied from city to city. In Boston, for example, the Board met five times a year, both the Chicago and Dallas-Forth Worth Boards met quarterly, and the New Orleans and San Francisco Boards met every other month.[58]

Several FEB members and officials from various cities indicated that the emphasis at full Board meetings was predominantly social.[59] They compared FEBs to a Rotary Club or a local chamber of commerce.[60] OMB stated:

> One of the purposes of FEBs is to bring together the heads of the various agencies in the metropolitan area. Even though some of the FEB events may be more social than business in nature, they provide an opportunity for agency heads to establish communication which may open the door to future interagency cooperation and coordination.[61]

The tenor of Board meetings, however, appeared to vary from city to city. Some FEBs were more socially oriented than others,[62] but this appeared to have no correlation with substantive accomplishment, for even less social FEBs had difficulty in achieving their objectives.[63]

C. The Chair and Its Resources

The FEB chairperson, who was usually elected for a 1-year term by the full FEB membership,[64] was the focal point of the FEB. The degree of enthusiasm and zeal of the chairperson will directly affect the motivation of the membership and the resulting FEB activities.[65] The chairperson's role was that of a convenor. In addition to presiding over meetings, the chairperson facilitated the exchange of information within the FEB, managed the FEB staff, and served as a speaker on behalf of the FEB before local groups.[66] It should be noted that all chairpersons carried out their responsibilities on a part-time basis. Some chairpersons delegated much of their responsibility, while others did not.[67]

One of the chairperson's most valuable resources was the executive assistant, a full-time career civil service employee[68] whose duties included planning Board meetings, coordinating activities of the various committees, preparing the annual report and work plans for OMB, and providing information upon request of the chairperson and the various FEB committees.[69] The executive assistant provided some continuity to FEB operations since the assistant usually served for a term longer than that served by the FEB chairperson.[70]

D. Committees

FEB committees organized and coordinated the basic activities to carry out FEB program objectives. All FEBs maintained standing committees pertaining to the national objectives designated by OMB. Thus, in fiscal year 1976 each FEB had standing committees on minority business enterprise, energy conservation, and personnel management.[71] In addition, most FEBs had committees to work on local activities such as the Combined Federal Campaign[72] and health and safety programs.[73]

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[58] Prout *et al.* interviews, *supra* note 54.

[59] Interviews with EEOC regional directors: Elmer McLain, Region V, Chicago, and Frank Quinn, Region IX, San Francisco, Jan. 28, 1976; Larry Ramirez, Region VI, Dallas-Fort Worth, and Edward Mercado, Region II, New York, Jan. 29, 1976 [hereinafter referred to as McLain *et al.* interviews]; and Prout *et al.* interviews, *supra* note 54. The OMB Associate Director for Management and Operations also acknowledged that the FEBs were quasi-social in nature. Oaxaca interview, *supra* note 49.

[60] *Id.* They also indicated a preference of FEB chairpersons to hold full board meetings at military installations whenever possible in order to take advantage of the facilities of officers' clubs and the reduced prices offered. McLain *et al.* interviews, *supra* note 59.

[61] Oaxaca letter, *supra* note 10.

[62] For example, the Boston FEB's Nov. 15, 1972, meeting centered around coffee, cocktails, and lunch. A subsequent meeting of the Boston FEB, in April 1975, continued the social pattern of prior meetings, was held at Anthony's Pier 4 restaurant. The cost for each member was $10. Announcement and agenda, Boston FEB meeting, Apr. 16, 1975. It would appear that a $10 charge might discourage full participation of members. Similarly, the Dallas-Fort Worth FEB meetings center around a breakfast or luncheon with a keynote speaker of general interest to all members. The Boston FEB added:

> A more recent example might be cited. The December 19, 1975, meeting held at the Pier 4 Restaurant also featured coffee, cocktails and lunch. It also featured a report on *Minority Business activities*, a status report on the *Combined Federal Campaign*, a briefing by a White House staff member on *Consumer Representation Plans*, Committee reports on *Productivity*, Improvement and Preventive Health Programs, and an executive briefing on recent changes in *Labor Management Relations* regulations by the Civil Service Commission's top expert. The December 1975, meeting is a typical example, others can be furnished if requested. Oaxaca letter, *supra* note 10. [Emphasis in original.]

In contrast, New Orleans FEB meetings did not center around social activities. The full board met Nov. 17, 1975, in a Federal building, and its agenda did not include a keynote speaker nor a luncheon. Announcement and agenda of full board meeting to FEB members from New Orleans FEB Chairman William Murfin, Nov. 7, 1975.

[63] The accomplishments of the FEBs are discussed more fully in sec. III *infra*. The Boston FEB, for example, which sponsored meetings more social in nature than the New Orleans board, was no less, and perhaps more, productive than the New Orleans FEB.

[64] The FEB membership votes on a single nomination for the position made by the policy committee. Prout *et al.* interviews, *supra* note 54.

[65] *Id.*

[66] February 1976 Hughes interview, *supra* note 34.

[67] Telephone interview with Karen Sagett, management analyst, Intergovernmental Relations and Regional Operations Division, OMB, Sept. 17, 1976.

[68] Executive assistants' salaries ranged from $14,097 for grade 9 to $28,725 for grade 14. Telephone interview with Karen Sagett, management analyst, IRRO, OMB, Feb. 9, 1976.

[69] Prout *et al.* interviews, *supra* note 54.

[70] The executive assistant's tour of duty is usually 18 to 24 months and, therefore, usually overlaps the terms of two FEB chairpersons. The Federal agency which provides the executive assistant and the FEB chairperson determine the length of the duty tour. Telephone interview with Charles B. Hughes, OMB, Mar. 18, 1976.

The FEB chairperson appointed committee chairpersons after receiving recommendations from the policy committee and less formal input from the chairperson's executive assistant. The appointed committee chairpersons, in turn, solicited members for their particular committees from the general membership.[74] Committees reported monthly to the policy committee[75] through the executive assistant. However, only those committees that had significant activity during the period between Board meetings made reports to the full Board at its meetings. As a result of this reporting procedure, it was usually only the chairperson, members of the policy committee, and the executive assistant who were fully aware of the entire range of activities of the FEB at any given time.[76]

The most influential internal mechanism of FEBs was the policy committee which not only monitored other committee functions but also provided policy guidance and control. All committees submitted periodic progress reports to the policy committee which meets monthly. In addition, the policy committee reviewed and approved the FEB annual report and work plan and served as the chairperson's advisory panel.[77] The policy committee was, in effect, the brain controlling the rest of the FEB body.

The policy committee was always headed by the FEB chairperson.[78] It generally consisted of 14 or 15 members who held overlapping 3-year terms in order to provide continuity to FEB program management. Members generally included the past FEB chairperson and members from the Civil Service Commission (CSC) and the General Services Administration[79]

III. FEDERAL EXECUTIVE BOARD ACTIVITIES

A. Introduction

The extent to which Federal Executive Boards were productive in furthering civil rights goals or any other objectives appeared to depend on a number of factors. The most important were the OMB memoranda which summarized policy priorities and written guidance from the lead agencies.[80] FEB programs were also dependent on such factors as the committee chairperson's ability to motivate the membership, the amount of time members could devote to FEB activities beyond their normal work responsibilities, and the amount of turnover in committee membership. As noted previously, FEBs are voluntary organizations.

FEBs sponsored a large number of activities with direct implications for the rights of minorities and women, chiefly in the areas of equal employment opportunity and business opportunities for minorities.[81] Certain important forms of discrimination against minorities and women, however, were largely ignored. For example, there was no national effort through the FEBs to promote fair housing, although each Federal agency had a responsibility under Title VIII of the Fair Housing Act of 1968[82] to promote the purposes of the act. Of the five FEBs studied by this Commission, only two FEBs had sponsored any activities involving fair housing, most of which occurred in fiscal year 1973 or earlier.[83]

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[71] For a discussion of national objectives, see sec. I(B) *supra*.

[72] The Combined Federal Campaign is discussed in sec. III(D) *infra*.

[73] Chicago FEB, *Work Plan, Fiscal Year 1976*, at 33, 38–42. Dallas-Fort Worth FEB, *Work Plan, Fiscal Year 1976*, at 35–37, 40. These activities are discussed in secs. III and IV *infra*.

[74] Prout *et al.* interviews, *supra* note 54.

[75] *Id.*

[76] OMB stated, "This generalization may not necessarily be the case in all FEBs." Oaxaca letter, *supra* note 10. For example, the Boston FEB commented, "The Boston FEB, moreover, makes every conceivable effort to inform the full membership via minutes, newsletters and special notices of all relevant activities." *Id*.

[77] Prout *et al*. interviews, *supra* note 54. The name of the policy commitee varied from city to city. For example, in Chicago this committee was referred to as the "Executive Committee" and members' terms were for 2 years. *Id*.

[78] While often the Policy Committee was selected by the FEB membership, this was not true in Dallas or Boston. The FEB procedures in those cities provided "that the Board of Directors (Policy Committee) will be constituted by the Chairmen of the major Committees who will be appointed by the Chairman with approval of the Executive Board (full membership). Boston makes the same statement." Oaxaca letter, *supra* note 10.

[79] Prout *et al*. interviews, *supra* note 54.

[80] The lead agency concept is discussed in sec. I *supra*.

[81] Concerning this Commissions view of FEB activities, OMB wrote:

> FEBs have reported positive accomplishments which have not been discussed by the Commission in this report. Concrete accomplishments not mentioned in the Commission's report include: seminar for EEO officers; publication of handbooks for Spanish-speaking Program Coordinators and for Federal Women's Program Coordinators; sponsorship of noteworthy seminars and guest speakers for each of the subcommittees' meetings, distribution of lists of handicapped persons available for employment to Federal agencies; numerous activities during National Hispanic Heritage week, organization of a Handicapped Week Display, arrangement for spokespersons for Federal Career Information Sessions scheduled at high schools with a majority of Spanish-speaking students; and numerous other activities aimed at establishing rapport with appropriate community organizations. Oaxaca letter, *supra* note 10.

We note, however, that this chapter on the Federal Executive Boards, makes numerous references to seminars, workshops, speakers, meetings, handbooks, and contacts outside the Federal community. It does not attempt to be exhaustive in listing all FEB activities which pertain to minorities and women. Rather, its purpose is to evaluate the approach of the FEBs to civil rights activities and potential activities and to assess the extent to which FEB efforts, in general, are responsive to the special concerns of minorities and women. In order to fairly represent the view of OMB and the FEBs, the chapter has been revised to incorporate all reference to additional information on FEB activities pertaining to minorities and women which OMB provided us.

Similarly, little was attempted or accomplished by the FEBs to promote equal educational opportunities.[84] An education committee established by the San Francisco Board in 1972 eventually disintegrated after failing to develop any objectives.[85] Apparently, the only other instance in which a FEB studied by this Commission addressed discrimination in education[86] occurred in 1975 in Boston after this Commission called upon OMB to direct the FEB and the Federal Regional Council to work with the Boston school system, State and local officials, private organizations, and community leaders "in order to provide the maximum possible Federal support for school desegregation in Boston."[87] This Commission also recommended that the FEB and FRC determine the amount of Federal funds and technical assistance necessary to strengthen the process of school desegregation.[88] The FEB and FRC were also urged to prepare materials explaining to Federal employees the court's finding of intentional segregation and to develop a program for encouraging Federal employees to volunteer their services to assist local officials in implementing the desegregation order.[89] The Boston FEB noted, "Materials explaining the desegregation order were distributed to all Federal employees, a special briefing was conducted for top management and more extensive materials were distributed. Similar briefings were subsequently held in numerous agencies."[90] This Commission further recommended that the FEB and FRC develop a program under which Federal employees in the Boston area be given the opportunity and the incentive to volunteer their services to the Boston community to facilitate the process of school desegregation.[91] The Boston FEB stated:

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[82] 42 U.S.C. §3601 *et seq.* (1970) prohibits discrimination in housing on the basis of race, color, religion, sex, or national origin. Title VIII enforcement is discussed extensively in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. II: To Provide. . .For Fair Housing* (1974).

[83] In 1972 the San Francisco FEB established a housing task force under the auspices of its equal employment opportunity committee. The task force was charged with developing a mechanism to coordinate the relocation of bay area residents in compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601 *et seq.* (1970). The act provides for uniform and equitable treatment of persons displaced from their home, businesses, or farms by Federal and federally assisted programs. As of March 1973, the only major activity of the task force was a meeting in August 1972 of all agencies involved in residential relocation activities. San Francisco FEB, *Annual Report for Fiscal Year 1972 and Work Plan for Fiscal Year 1973*.
In addition, the Boston FEB has stated:

> The Boston FEB sponsored a Fair Housing Program through FY 1973. The Fair Housing Committee published a comprehensive directory, which is generally current and still in use by several agencies. Its use has been supplemented or replaced by commercial directories, which provide the same basic information at a much lower cost. The revitalization of a Fair Housing program was recommended to our Community Services Committee in March of 1976. A proposal is being developed. Oaxaca letter, *supra* note 10.

[84] Federal laws requiring equal educational opportunities are discussed extensively in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. III: To Ensure Equal Educational Opportunity* (1975). See also, U.S. Commission on Civil Rights, *A Better Chance to Learn: Bilingual-Bicultural Education* (1975).

[85] San Francisco FEB, *Annual Report for Fiscal Year 1973* at 51-52.

[86] The Boston FEB stated:

> Contrary to the report, Boston FEB involvement in the Boston School situation predated CRC recommendations by at least ten months. Beginning in September 1974, William Gibson, then Vice Chairman, personally took a leading role, with the full support of the Board, in monitoring the civil disruption which occurred. . . . As a result, the Board was able to establish a valuable relationship with Federal, State and local officials and community groups. In January 1975, the Board responded to a School Department appeal and provided thirty Federal employees to serve as tutors. In June 1975, the Board established a Task Force on School Desegregation to develop programs for continued involvement. All of these actions were taken before the CRC made its recommendations. Oaxaca letter, *supra* note 10.

This Commission stands by its statement. The activities of the Boston FEB were investigated extensively by this Commission with its hearing in Boston in June 1975. This Commission concluded that the FEB had not been "utilized to facilitate school desegregation in a meaningful manner." U.S. Commission on Civil Rights, *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* 212 (1975). For example, the purpose of the FEB monitoring which it noted in comments to this Commission was not primarily to eliminate discrimination in education. Rather, as the Boston FEB has noted:

> Our initial concern was for the safety of Federal employees working in and traveling through the city. [The FEB] Vice Chairman, volunteered to monitor the situation and to report back on any actual or potential areas of violent confrontation. The FEB office would then act as an information center to warn employees away from trouble spots through its emergency dismissal telephone network. Boston FEB, *Annual Report: Fiscal Year 1975* at Boston Public Schools Section [hereinafter referred to as *Boston FEB, FY '75 Annual Report*].

[87] *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility supra* note 86, at 214. The Boston FEB stated:

> The Boston FEB did work with City and State officials to provide maximum support for the desegregation effort. In a series of meetings with Federal Judge W. Arthur Garrity, Associate School Superintendent Charles Leftwich and State Secretary of Education, Paul Parks, held during the summer and fall of 1975, it was determined that the Federal community in Boston should maintain a low profile of involvement concentrating on those activities which could be directly related to the educational experience. This is what the Boston FEB attempted to do. Oaxaca letter, *supra* note 10.

[88] *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility*, *supra* note 86, at 214. The Boston FEB stated, "Funding requirements and technical assistance requirements are best evaluated by agencies having special competence in the areas of education and law enforcement, the Boston FEB rightfully took no part in such activities." Oaxaca letter, *supra* note 10. This Commission had hoped, however, that all Federal agencies in the Boston area would, in a spirit of cooperation, work together creatively to assess how the Federal Government might best assist the Boston public school system as it went through the process of desegregation. Nonetheless, the Boston FEB stated "The Boston FEB not only complied with the recommendations of the CRC, they exceeded them." *Id.*

[89] *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility*, *supra* note 86, at 214-15.

[90] Oaxaca letter, *supra* note 10.

> The program developed by the Task Force on Desegregation was designed to meet the final recommendation of the CRC, providing voluntary service opportunities for Federal employees. It was quite successful. Sixty volunteer tutors were assigned to the schools. . .[T]hirty HEW monitors went into South Boston as a result of FEB endorsement.[92]

In addition, in response to the Commission's recommendations, OMB issued a guidance memorandum to the Boston FEB and FRC.[93] The memorandum, however, did not specifically endorse any of this Commission's recommendations. OMB's guidance memorandum indicated that the FRC "should continue its current efforts" to support the Department of Health, Education, and Welfare in "assuring that Federal assistance programs which provide direct support to or impact upon the Boston public school system are planned and coordinated in a manner most conducive to improving the quality of education for all students in the public school system"[94] during implementation of the court order. OMB further indicated that this Commission's recommendation for a review of agencies' desegregation responsibilities "might be appropriate for discussion with the various agency heads. . .under the auspices of the FEB."[95] No mention was made of this Commission's recommendation that the FEB and FRC distribute materials to Federal employees explaining the court's finding of intentional segregation in Boston. Finally, OMB indicated support for the FEB's previous plans for encouraging Federal employees to volunteer tutorial and job counseling assistance to area students.[96] Subsequently, the FEB did initiate four programs,[97] responding to what this Commission had recommended, but none of these had been accomplished as of April 1976.[98]

B. Equal Employment Opportunities for Minorities and Women

FEBs could play a significant role in promoting equal employment opportunity (EEO) in Federal employment, as well as in local government employment.[99] The Executive Director of the Civil Service Commission commented:

> . . .I share the draft report's general theme as I understand it, namely that the. . .FEB's are potentially vital instruments in guaranteeing civil rights generally and in achieving equal opportunity in public sector employment particularly. It is, of course, in the latter area that the Civil Service Commission's major interest obtains.[100]

Because their membership consists of representatives from all Federal agencies within a designated metropolitan area, FEBs could effectively work with the Civil Service Commission to develop joint objectives for improving Federal EEO and monitor member agencies' progress in obtaining these goals. For example, FEBs could appeal for a Government-wide commitment to hire and upgrade minorities and women at the local level where the FEB is located.

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[91] *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* *supra* note 86, at 215.

[92] Oaxaca letter, *supra* note 10.

[93] Memorandum from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to Chairpersons, Boston FRC and FEB, Sept. 25, 1975.

[94] *Id.*

[95] *Id*.

[96] During fiscal year 1975, the Boston FEB sponsored a program which resulted in approximately 50 Federal employees volunteering their time to tutor students who had missed classes when some schools were closed during the desegregation crisis. *Boston FEB FY '75 Annual Report, supra* note 86, at Boston Public Schools section.

[97] The four programs were: 1) a career counseling program to provide Federal volunteers to counsel students about career options, 2) a "Shared Experience Program" in which high school students would be assigned to Federal offices to observe how government works, 3) a summer employment program to provide 100 summer jobs for disadvantaged youths, and 4) an orientation program to familiarize students not going to college with Federal employment examinations, general intelligence examinations required by many private employers, and basic job interview technique. In December 1976 the Boston FEB reported on the progress of the first two programs. The Boston FEB stated:

> The Career Counseling Program began in the spring of 1976 and led to over 250 Federal employees volunteering to visit elementary, middle and high schools throughout the city. The [S]hared [E]xperience [P]rogram is being implemented under the guidance of our Community Service Committee. Oaxaca letter, *supra* note 10.

Regarding the third program, the Boston FEB reported:

> OMB did reject our request for an additional 100 summer jobs and for authority to waive income requirements to permit direct referrals from the schools. This discouraged us but did not stop us as the report implies. Working with agencies in suburban locations and arranging transportation through contacts in the State, we were able to provide an additional sixty summer jobs for the youth of Boston. *Id*.

The Boston FEB also stated, "Additional initiatives included, the development of a unique Youth Leadership Training Program and plans for teacher training." *Id*.

[98] Telephone interview with Frank Prout, executive assistant, Boston FEB, Apr. 9, 1976.

[99] Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.* (Supp. V, 1975), prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The act, as amended in 1972, applies to Federal, State, and local governments, in addition to private employers, which were covered by the original act. Other Federal equal employment requirements are discussed in U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. V: To Eliminate Employment Discrimination* (1975) [hereinafter referred to as *To Eliminate Employment Discrimination*].

[100] Letter from Raymond Jacobson, Executive Director, U.S. Civil Service Commission, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Feb. 9, 1977 [hereinafter referred to as Jacobson letter].

In addition, FEBs could render significant assistance to city governments in complying with Federal laws requiring equal employment opportunity.

As indicated previously, FEB activities are governed by national objectives.[101] The only national objectives issued on the problem of employment discrimination were those proposed by the Civil Service Commission (CSC) under the heading of agency "Personnel Management."[102] OMB noted:

> FEB activities related to problems of employment discrimination have, for purposes of simplicity, been consolidated under the umbrella term "personnel management" unless a special objective has been proposed such as the jobs for Vets initiative. Included under personnel management are activities related to equal employment of women and Spanish-speaking Americans in addition to general EEO/upward mobility.[103]

CSC was the lead agency on all matters pertaining to agency personnel practices, including equal employment opportunity.[104]

For fiscal year 1975 CSC proposed equal employment opportunity as one of three areas of emphasis by FEBs in carrying out the personnel management objective.[105] CSC advised FEBs to focus their EEO efforts on the Federal Women's Program,[106] the Spanish-speaking program,[107] and an agreement on affirmative action principles reached in March 1973 by four Federal agencies.[108] For fiscal year 1976 CSC included EEO as one of seven areas of emphasis.[109] FEBs were advised to expand their EEO efforts to include sharing information on affirmative action, employee complaint handling, and upward mobility programs,[110] as well as promoting interagency work in the Spanish-speaking and Federal women's programs.[111]

In the past, this Commission strongly criticized the basic approach taken by the CSC in its guidelines and regulations governing Federal agency equal employment opportunity practices.[112] In particular, this Commission has concluded that CSC's guidelines on affirmative action were deficient because they failed to require the Federal Government to adhere to the same requirement imposed on other employers, namely, that numerical goals and timetables must be developed for overcoming past discriminatory practices.[113] This Commission also criticized CSC for placing too much emphasis on agency implementation of certain steps, such as selecting a Federal Women's Program Coordinator, while not evaluating whether such implementation actually resulted in any improvement in the employment status of women and minorities.[114]

The basic guidance on EEO activities which CSC developed for FEBs suffered from the same deficiencies as the Commission found in CSC directives to Federal agencies. As a result, FEB committees assigned the task of promoting equal employment opportunity did not focus on achieving any measurable improvement in the employment status of women and minorities among the member agencies. Instead, FEB committees generally established project evaluation criteria which measured the tasks accomplished. For example, committees often evaluated the success of recruiting projects not by the number of minority or female applicants recruited and hired but rather by the number of recruiting visits conducted or the extent to which literature was distributed.[115]

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[101] See sec. I *supra*.

[102] See, e.g., memorandum from Fernando Oaxaca, Associate Director for Management and Operations, OMB, to all Federal Executive Board Chairpersons, "Federal Executive Board's Objectives for FY 1976," Aug. 21, 1975.

[103] Oaxaca letter, *supra* note 10.

[104] February 1976 Hughes interview, *supra* note 34.

[105] The other two areas of emphasis were employment of the handicapped and coordination of employee dismissal. Memorandum from Robert E. Hampton, Chairman, U.S., Civil Service Commission, to Chairmen of Federal Executive Boards, Aug. 22, 1974.

[106] The Federal Women's Program was established by CSC to improve the employment status of women in the Federal Government. Each agency and department with more than 7,500 employees must appoint a Federal Women's Program Coordinator on a full-time basis. See Civil Service Commission, Federal Personnel Manual (FPM) Letter No. 713-15, Feb. 27, 1970; and Bulletin No. 171-405, Oct. 30, 1973. See also, *To Eliminate Employment Discrimination*, *supra* note 99, at 107-09.

[107] The Spanish-Speaking Program is directed at improving agencies' recruitment of persons of Spanish origin. CSC, FPM Letter No. 713-18, Jan. 23, 1973. Coordinators of programs on Spanish speaking and women serve primarily as assistants to agency EEO directors. See *To Eliminate Employment Discrimination*, *supra* note 99, at 108-09.

[108] The four agencies were CSC, EEOC, and the Departments of Labor and Justice. This agreement was set forth in a memorandum from Robert Hampton, Chairman, CSC; Stanley Pottinger, Assistant Attorney General; William Brown III, Chairman, EEOC; and Philip Davis, Acting Director, Office of Federal Contract Compliance Programs, Department of Labor, to U.S. Attorneys and Field Representatives of the Civil Service Commission, Equal Employment Opportunity Commission and Office of Federal Contract Compliance, entitled "Federal Policy on Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems," Mar. 23, 1973. This memorandum is discussed in ch. 1 *supra*.

[109] The other six areas of emphasis were employment of the handicapped, labor-management relations, employment of veterans, productivity, cost effectiveness, and organizational effectiveness. Letter from Bernard Rosen, Executive Director, CSC, to Vincent Puritano, Deputy Associate Director, OMB, Apr. 17, 1975.

[110] Upward mobility programs are designed to improve the advancement opportunities of employees in lower grades through training and the creation of trainee positions. See Civil Service Commission, FPM Letter No. 713-27, June 28, 1974.

[111] Rosen letter, *supra* note 109.

[112] See *To Eliminate Employment Discrimination*, *supra* note 99, at 1-137. See also letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, to Robert E. Hampton, Chairman, Civil Service Commission, Dec. 30, 1975.

[113] *To Eliminate Employment Discrimination*, *supra* note 99, at 17-19 and 88-90.

[114] *Id.* at 95-96. Other Commission criticisms pertained to CSC standards on validating the job-relatedness of tests, complaint handling procedures, and evaluations of agency personnel practices. *Id.* at 24-60, 61-86, 115-137.

CSC, as the lead agency within FEBs on equal employment matters, was also responsible for evaluating FEB equal employment opportunity activities. As will be discussed below, CSC did not carefully evaluate these activities to determine their consistency with CSC guidelines, let alone to determine whether the activities led to any improvement in the employment of women and minorities. The CSC Executive Director subsequently stated:

> . . .I want to point out that to the extent the report suggests that there is some fundamental, philosophical difference between your Commission's concept of affirmative action and ours, that suggestion is at best obsolete. The Chairmen of both our Commissions were signatories to the Equal Employment Opportunity Coordinating Council's policy statement on Affirmative Action Programs for State and Local Government Agencies (Federal Register, September 13, 1976). While, no doubt, we might still have differences over specific operational situations, I for one am pleased that we have reached accord on basic policy. . . .
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> . . .As you know we responded in considerable detail to that earlier criticism, pointing out the major accomplishments to date while acknowledging the need for further specific improvements. I will not here repeat that response. While I am not at all surprised at the view that our guidance to FEB's parallels, and is consistent with, our guidance to Federal agencies I am surprised that this draft once again focuses on whether "numerical goals and timetables must be developed for overcoming past discriminatory practices." Since FEB's as organizations are not employers, it hardly makes sense to berate us or them on that issue. Federal Executive Boards are mechanisms for sharing, for cooperation and coordination, for concerted action. To fault them for emphasizing joint activities designed to further equal opportunity seems to miss the point of their existence. While numerical goals and timetables may well be appropriate for individual agencies, we do not envision circumstances where they would be appropriate for an FEB.[116]

Moreover, OMB stated, in response to our evaluation of the shortcomings in FEB equal employment activity, that:

> FEBS cannot be expected to be aware of CCR differences with the basic approach taken by CSC in its guidelines and regulations governing Federal EEO practices. As the agency with primary jurisdiction in this area, CSC is the agency to which FEBs rightfully look for guidance. Any lack of FEBs achieving measurable improvement in the employment status of women and minorities which CCR attributes to deficiencies in CSC advice to FEBs is a matter that would properly have to be resolved between CCR and CSC.[117]

The FEBs, themselves, responding in unison, echoed that position by asserting that "The failure of the Civil Service Commission to set numerical goals and timetables should not be included here since it implies that FEBs have somehow contributed to this failure."[118]

These December 1976 responses evidence a slight, but significant, misreading by both OMB and the FEBs regarding this Commission's position. Our criticism of the FEBs was not that they contributed to CSC's failure to include explicit goals and timetables and other relevant EEO provisions in its regulations. Rather, we believe that FEBs were overly reliant on CSC for EEO guidance and direction, based on CSC being the "lead agency" for Federal EEO. Both Title VII of the Civil Rights Act of 1964, as amended[119] and CSC's own regulations[120] clearly indicate that each Federal agency shall be individually responsible for equal employment opportunity within its own employment policies and practices. The Civil Service Commission's responsibility has been to review and approve Federal agency affirmative action plans, but not to provide equal employment opportunity in each Federal agency. It is incumbent upon Federal agencies themselves to develop their equal employment opportunity plans and to take whatever action is necessary to ensure equal employment opportunity within their own personnel operations.

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[115] For further discussion of this point, see discussion in note 127 *infra*.

[116] Jacobson letter, *supra* note 100. CSC's response to "earlier criticism" is chronicled in *To Eliminate Employment Discrimination*, *supra* note 99, at ch. 1.

[117] Oaxaca letter, *supra* note 10.

[118] *Id*.

[119] 42 U.S.C. §2000e–17(b) and (e) (Supp. V, 1975).

[120] CSC regulations state:

> The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. 5 C.F.R. §713.203.

It is the view of this Commission that, given the general role assigned to FEBs and the clear reference to development of regional plans for Federal agency EEO activities in Title VII,[121] FEB members, in the spirit of cooperation, could do a great deal more than they have done to date to assist each other to improve their agencies' equal employment opportunity postures and to improve the Federal posture in [illegible] metropolitan area as a whole. Moreover, the development of agency-by-agency goals and timetables for the FEBs' metropolitan areas would in no way violate CSC regulations. CSC has itself been a party almost 4 years to a Federal interagency memorandum specifically enunciating, as a matter of Federal policy, the validity of goals and timetables, as distinguished from quotas.[122] FEBs clearly could act as a catalyst for promoting such goals where they are needed to effectuate equal opportunity within the practices of member agencies, while assuring uniformity and consistency in the implementation of equal employment opportunity plans within the FEBs' metropolitan areas.

FEBs implemented EEO program activities suggested by CSC through one or more committees. Some FEBs, such as the FEB in Chicago, maintained a single EEO committee with subcommittees addressed to the special problems of women or persons of Spanish origin. Other FEBs, such as those in Boston, Dallas, New Orleans, and San Francisco, had separate full committees on either women or persons of Spanish origin or both.[123]

Boston

The Boston FEB's EEO activities were conducted by two full committees, the Minority Opportunity Committee and the Women's Opportunity Committee. As of March 1976 few significant goals had been established or accomplished by these committees. In this respect, the Boston FEB was typical of the five FEBs studied by this Commission.

For fiscal year 1975, the Minority Opportunity Committee of the Boston FEB adopted 14 objectives, only a few of which were significant goals likely to help eliminate discrimination.[124] For example, the committee intended to disseminate job announcements to minority groups but did not have an objective to review hiring practices and policies applied to persons responding to the announcements. Similarly, the committee planned to promote "awareness" of the Spanish-speaking programs within agencies but did not plan to assess what impact, if any, such programs were having on the employment status of persons of Spanish origin.

At least half of the 14 objectives established by the committee were not fully accomplished.[125] The chairperson of the Boston FEB's Minority Opportunity Committee indicated that a data compilation project reached a stalemate when the committee was unable to obtain adequate statistics from the Civil Service Commission and other Federal agencies.[126]

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[121] 42 U.S.C. §2000e-17(b)(1) (Supp. V, 1975).

[122] Four agency memorandum, *supra* note 108. The Boston FEB also stated:

> The Boston FEB does work effectively with CSC. Our Minority Opportunity Committee is chaired by the Regional Director of CSC. However, EEO regulations give ultimate responsibility for compliance directly to employing agencies. The CSC has the responsibility to monitor and evaluate. *Setting employment goals or quotas is specifically forbidden. The FEB provides active support for agency and CSC activities.* To do more would violate our mandate and exceed our competency. We have appealed for voluntary compliance on numerous occasions. [Emphasis in original.] Oaxaca letter, *supra* note 10.

CSC regulations prohibit the establishment of quotas for the employment of persons on the basis of race, color, sex, or national origin (5 C.F.R. §713.302(d)). Those regulations do not mention goals and the Boston FEB's statement that goals are prohibited is plainly wrong. The Civil Service Commission's position is that agencies are permitted, but not required, to adopt goals on their own initiative, as long as they are based on the current supply of qualified minorities and women in the recruiting area. Memorandum from Robert E. Hampton, Chairman, CSC, to Heads of All Agencies, May 11, 1971, and FPM letter No. 713-22, Oct. 4, 1973.

[123] The committee structures pertaining to EEO within the FEBs visited by Commission staff were—Boston: Minority Opportunity Committee and Women's Opportunity Committee; Chicago: Equal Employment Opportunity Committee, including three subcommittees on women, the handicapped, and persons of Spanish origin; Dallas: Equal Employment Opportunity Committee, including a subcommittee of Spanish-speaking program coordinators and a separate Federal Women's Program Committee; New Orleans: Equal Employment Opportunity Committee and a Federal Women's Program Committee; and San Francisco: Equal Employment Opportunity Committee, including a subcommittee on the Federal Women's Program and a separate full committee called the Spanish-Speaking Program Coordinating Council.

[124] Other objectives were as follows: providing information on Federal services to older minority persons, providing EEO training to Federal personnel, sponsoring a commemoration of Martin Luther King's birthday, developing an FEB policy statement on EEO, providing information on Federal job opportunities to the economically disadvantaged in Boston, sponsoring Spanish language classes for English-speaking Federal personnel, developing and distributing radio and television public service announcements pertaining to Federal activities affecting women and minorities, distributing awards to Federal employees for outstanding achievement in EEO, compiling statistics on minority employment in the Boston areas; establishing a clearinghouse regarding successful EEO program innovations by Federal agencies; developing an EEO pamphlet, and distributing an EEO newsletter. *Boston FEB FY '75 Annual Report, supra* note 86, at Minority Opportunity Committee section.

[125] *Id.*

[126] Telephone interviews with Charles A. Maher, Chairperson, Minority Opportunity Committee, Boston FEB, Feb. 22 and Mar. 17, 1976. Another objective not achieved by the committee was a clearinghouse of information regarding successful agency EEO projects. The plan for the clearinghouse was not implemented, according to the committee's report, because agencies failed to respond to requests for information. *Boston FEB FY '75 Annual Report, supra* note 86, at Minority Opportunity Committee section. Implementation of the objective of promoting awareness of the Spanish-

A few objectives, such as providing EEO training, were accomplished. The committee conducted seven luncheon training sessions[127] and also carried out its goal of commemorating the birthday of Martin Luther King.[128] Although the committee accomplished its objective of conducting Spanish language courses for Federal employees, the level of participation was low due to insufficient internal publicity.[129] The committee also succeeded in distributing 10 awards to Federal employees for outstanding achievement in EEO.

The chairperson of the Minority Opportunity Committee indicated that he believed the committee had not accomplished a number of the year's objectives because the objectives were made as ambitious as possible.[130] He also attributed the lack of success to the high turnover rate of members and a heavy workload for the individual members with experience on the committee.[131] The CSC evaluation of the committee's accomplishments, on the other hand, concluded that they were "impressive."[132]

As a result of its poor performance during fiscal year 1975, the committee adopted only six goals for fiscal year 1976,[133] only two of which were significant. One was the establishment of two full tuition scholarships for "disadvantaged" students.[134] The committee chairperson indicated, however, that as of February 1976, no progress had been made in achieving this objective.[135] The fiscal year 1976 work plan reiterated the previous year's objective to collect statistical data on minority employment in the Boston labor force as well as in the Federal installations in the Boston area. As of February 1976, however, no progress had been made toward this objective,[136] which, as indicated above, was perhaps the only project having the potential of contributing significantly to agencies' efforts to eliminate employment discrimination.

The Boston FEB established a separate committee on the employment problems of women. The Boston FEB stated, "The Women's Opportunity Committee of the Boston Federal Executive Board has consistently been one of our most active and successful committees. Its impact has been demonstratively positive."[137] As of February 1976, the Women's Opportunity Committee had accomplished most of its objectives, although it had not apparently caused any positive impact on the employment status of women in Federal agencies. This committee's fiscal year 1975 objectives included publishing a report to advocate the utilization of part-time employment of women in the Federal work force, conducting a survey of women in management, sponsoring a seminar on the Federal Women's Program for local agency heads, educating new Federal Women's Program coordinators in a 1-day seminar, and establishing a women's opportunity skills bank.[138]

The committee chairperson indicated that the effect of the report advocating utilization of women in part-time employment had been negligible, principally because Federal supervisors believed allowing part-time employment would disturb Federal office routines.[139] The Boston FEB stated:

> The study on part-time employment in FY 1975, revealed for example that agencies were not using this method for employing more women for very good reasons which have nothing to do with discrimination. Part-time employment, for example, involves a considerable increase in certain cost factors. Part-time employment uses full-time slots where agencies have no special

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speaking program through a 2-day conference was thwarted by sparse attendance by Federal regional heads. *Id.*

[127] These sessions were attended, on the average, by 50 EEO officials from various agencies. The training program was evaluated according to the number of attendees and not according to what impact, if any, it had on agencies' affirmative action programs. *Boston FEB FY '75 Annual Report, supra* note 86, at Minority Opportunity Committee section.

[128] This objective was completed by obtaining pictures and signed documents of Martin Luther King from Boston University for display in the lobby of the John F. Kennedy Federal Building. *Id.*

[129] *Id.*

[130] Maher interviews, *supra* note 126.

[131] The committee membership averaged 20 persons during the year. The chairperson indicated that this number was sufficient to accomplish only the more "realistic" objectives. *Id.*

[132] CSC's evaluations of individual FEBs were provided informally to OMB staff, who transmitted CSC's comments to Commission staff on Feb. 11, 1976, in an undated document [hereinafter referred to as CSC evaluation]. CSC's formal evaluation did not address the activities of specific FEBs. Memorandum from George S. McQuoid, Assistant Executive Director for Regional Operations, CSC, to Vincent Puritano, Deputy Associate Director for Intergovernmental Operations, OMB, Jan. 15, 1976. The Boston FEB stated, "The Civil Rights Commission's mention of a CSC evaluation is incorrect. There was no CSC evaluation." Oaxaca letter, *supra* note 10. However, in the course of a Commission staff inquiry to OMB staff concerning the undated document, which is entitled "Civil Service Commission review of FEB FY 1975 Annual Reports and FY 1976 Work Plans," an OMB staff member affirmed that the evaluations in the document were CSC's evaluations. Telephone interview with Karen Sagett, management analyst, IRRO, OMB, Apr. 8, 1976.

[133] Boston Federal Executive Board, *Work Plan: Fiscal Year 1976* [hereinafter referred to as *Boston FEB FY '76 Work Plan*].

[134] [illegible]

[135] Maher interviews, *supra* note 126. The Boston FEB elaborated that, "a working Sub-Committee . . . developed the idea of the scholarships but was unable to achieve the goal because it required time and resources which were not available." Oaxaca letter, *supra* note 10.

[136] Maher interviews, *supra* note 126.

[137] Oaxaca letter, *supra* note 10.

[138] *Boston FEB FY '75 Annual Report, supra* note 86, at Women's Opportunity Committee section.

[139] Telephone interview with Eunice C. Cronin, chairperson, Women's Opportunity Committee, Boston FEB, Feb. 23, 1976.

allocations. Despite these reasons the survey revealed a considerable increase in part-time employment by agencies in the Boston area.[140]

It appears that the Boston FEB was misinformed in its view that "part-time employment uses full-time slots" thereby creating an obstacle to the use of part-time workers. The Civil Service Commission attempted to clarify such misunderstandings when it wrote:

> In Government as well as in private industry, wider use of part-time workers must be shown to be to managers' advantage. *In the past, reluctance on the part of Federal employers has often stemmed from the impression that they would have to count a part-timer against their ceiling on permanent full-time employees.*
>
> Adjustments can be made between the ceiling for temporary and part-time employees and the ceiling for permanent employees which will allow agencies greater use of part-time workers without losing employee-hours of work. [Emphasis added.][141]

The statistical survey of women in management revealed that no significant changes had occurred from 1969 through 1975 in grades 12 and above, grades which encompass most management positions.[142] The Boston FEB did note, however, that:

> The survey of Women in Management, published in FY 1976, revealed a considerable increase in the number of women employed in grades 5-8 reflecting the impact of upward mobility programs for clerical employees and recent entry level hiring. There were also promising increases at 9–11 grades and at the 12 grade.[143]

The total level of female employment had remained constant during this period in the Boston Federal work force. In 1975 women constituted 72 percent of the work force in the lowest four grades, 1 through 4, 54 percent in grades 5 through 8, 20 percent in grades 9 through 11, 3 percent in grades 13 through 14, and 3.4 percent in grades 15 through 17.[144] The committee chairperson also indicated that the proposed skills bank objective was not accomplished because of lack of resources.[145]

The 1976 work plan of the Women's Opportunity Committee included as one of five objectives the goal of promoting employment of women in middle and upper management positions.[146] This appears to have been the only objective adopted by the Boston FEB specifically directed at improving the employment status of women or minorities. Unfortunately, the committee did not propose agencywide numerical goals and timetables for carrying out this objective. Instead, the committee reported that it would attempt to promote employment of women in these positions through sponsoring a symposium on women in management and conducting a review of the management survey completed in fiscal year 1975.[147]

The committee chairperson indicated that progress on other objectives[148] was occurring but at a slower rate than expected because of the lack of time committee members could devote to the projects.[149] OMB stated:

> It should be emphasized that committee members are participating in FEB activities on a voluntary basis. Any time and effort contributed are over and above their performance of normal agency assignments. Under the circumstances, it is perhaps better to view their efforts as being a cup half full, rather than half empty.[150]

Chicago

Plagued by organizational difficulties, the Chicago FEB's Equal Employment Opportunity Committee, as of March 1976, had largely failed to accomplish even modest objectives. In fiscal year 1973, for example, the committee planned to develop and distribute three major EEO handbooks in fiscal year 1974.[151] Plans for two of the handbooks were abandoned[152] although one, "A Manager's Guide to EEO in the Federal Government,"[153] was eventually issued in fiscal year 1975 after the committee had undergone a major reorganization.[154] The guidebook was the major accomplishment of the committee that year.[155] It gave a brief overview of the purposes of affirmative action in Federal employment, the special emphasis programs on women and persons of Spanish origin, and steps a manager should take to further equal opportunity. The principal weakness in the guidebook was its discussion of what constitutes employment discrimination. By far the most frequent form of discrimination is the existence of seemingly neutral employment practices which adversely affect minorities and women and cannot be justified by business necessity or some other compelling purpose.[156] The guidebook failed to discuss this form of systemic discrimination and, instead, emphasized intentional discrimination and practices which treat individuals differently on the basis of sex, race, or ethnicity.[157] Rather than instructing managers how to identify systemic discrimination, the guidebook advised that the "key to non-discrimination is the recognition of individual qualities and individual circumstances."[158]

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[140] Oaxaca letter, *supra* note 10.

[141] U.S. Civil Service Commission, *The Federal Women's Program, A Point of View* (1972). The policy to which CSC referred is explained in detail in the Federal Personnel Manual, Section 312.

[142] Cronin interview, *supra* note 139.

[143] Oaxaca letter, *supra* note 10. The Boston FEB stated, "The purpose of the report was to focus attention on a new area, i.e., management and supervisory positions. It accomplished this purpose admirably." *Id*.

[144] Cronin interview, *supra* note 139.

[145] *Id*.

[146] *Boston FEB FY '76 Work Plan, supra* note 133, at Women's Opportunity Committee section.

[147] *Id*.

[148] Other fiscal year 1976 objectives adopted by the Women's Opportunity Committee included supporting career development programs by conducting an awards day for secretaries and clerks, preparing career counseling brochures, and sponsoring a seminar. Finally, the committee planned to investigate the feasibility of establishing a Federal day care center. As of February 1976, the career counseling brochure for women was scheduled for distribution to all Federal agencies and was to be placed at the Federal Job Information Center in Boston. The committee chairperson also indicated that during the full FEB election meeting, she had nominated a woman from the floor, which broke the tradition of the members rubber-stamping nominations of the policy committee. Cronin interview, *supra* note 139.

[149] *Id*.

[150] Oaxaca letter, *supra* note 10.

[151] The three handbooks planned were "Manager's Guide to Equal Employ-

The other fiscal year 1975 accomplishments of the Chicago FEB's EEO committee and subcommittees[159] were limited primarily to subcommittee reorganization.[160] The annual report, however, concluded that the subcommittees had "gained momentum" and were proceeding toward "concrete objectives" as of July 1975.[161] The CSC evaluation of the committee's activities was limited to the conclusion that it was "getting off to a good start in these areas."[162]

The fiscal year 1976 objectives of the EEO committee were not directly aimed at improving the employment of women and minorities but did include some projects that could have produced some meaningful results. As of March 1976, however, most of these endeavors had been abandoned or postponed. For example, the committee planned to develop and circulate a booklet recommending affirmative action steps, including those successfully implemented by member agencies.[163] As of March 1976, however, the committee had dropped these plans. The EEO committee's fiscal year 1976 objectives also envisioned the establishment of interagency sharing of resources for processing employment discrimination complaints. Such a system could have corrected the current deficiency in CSC complaint processing procedures, which provide that employees of the allegedly discriminatory agency investigate complaints.[164] The committee's plans were abandoned, however, in January 1976 because of lack of support from all agencies.[165] Other plans for fiscal year 1976 primarily focused on holding subcommittee meetings, sponsoring seminars, and establishing contact with civil rights and other public interest organizations.[166]

Dallas

The Equal Employment Opportunity Committee of the Dallas-Fort Worth FEB was created in early 1975 to replace the Federal Equal Employment Association, which, according to its chairperson, had

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ment Opportunity in the Federal Government," "A Handbook for Federal Women's Program Coordinators," and a "Directory of Minority Organizations." Interview with Carlos Ruiz, Director, Office of Civil Rights, GSA Regional Office, and EEO committee chairman, Chicago FEB, in Chicago, May 16, 1973.

[152] Telephone interview with Alfred A. Strandgard, FEB EEO committee chairperson for fiscal year 1974, and equal opportunity specialist, Federal Aviation Administration, Chicago, July 25, 1974. Mr. Strandgard stated that when he took over as committee chairperson, the EEO subcommittees in charge of the women's handbook and the minority directory had not accomplished anything noteworthy in the planning of these two projects. Since the subcommittees did not appear to be effective, they were abolished. Their projects were never taken over by the EEO committee itself. *Id.*

[153] Chicago Federal Executive Board, "A Managers Guide to EEO in the Federal Government" (1975) [hereinafter referred to as "Managers Guide"].

[154] Chicago Federal Executive Board, *Annual Report: Fiscal Year 1975*, at 27 [hereinafter referred to as *Chicago FEB FY '75 Annual Report*].

[155] Other activities, all carried out by the subcommittees on the Spanish-speaking, the handicapped, and women, consisted of holding meetings. This is briefly discussed in note 160 *infra*.

[156] See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); U.S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* at 5–6 (1973); and Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights Act of 1964*, 414 (Comm. Print 1972), 92d Cong, 2d Sess., 2144 (1973).

[157] The guidebook failed to explain that employment practices having an adverse impact on a protected class might be unlawful. See *To Eliminate Employment Discrimination*, *supra* note 99, at 31–33; it did, however, allude to "indirect, subtle discrimination (implied) resulting from an 'unequal' policy or practice. . . ." "Managers Guide," *supra* note 153, at sec. IV.

[158] *Id.*

[159] This committee structure is briefly discussed in sec. II(D) *supra*.

[160] The Spanish-speaking subcommittee, in addition to accomplishing its objective of holding meetings, facilitated interagency exchange of information on available candidates of Spanish origin. The Federal Women's Program subcommittee, in addition to holding monthly meetings, developed a questionnaire on agency projects relating to International Women's Year. *Chicago FEB FY '75 Annual Report*, *supra* note 154, at 27–29.

[161] *Id.* at 27.

[162] CSC evaluation, *supra* note 132.

[163] Chicago Federal Executive Board, *Work Plan: Fiscal Year 1976* [hereinafter referred to as *Chicago FEB FY '76 Work Plan*].

[164] For a discussion of this deficiency, see *To Eliminate Employment Discrimination*, *supra* note 99, at 70.

[165] Telephone interview with Steven Cohen, chairperson, Chicago FEB EEO committee, Feb. 13, 1976.

[166] For example, the Federal Women's Program Subcommittee planned to sponsor an event commemorating International Women's Year. *Chicago FEB FY '76 Work Plan*, *supra* note 163, at 27.

deteriorated to such an extent that it was defunct and required a complete restructuring.[167] The committee's objective for fiscal year 1975 was "to make certain that equal employment opportunity [was] afforded to citizens" in the Dallas-Fort Worth area.[168] However, most of the committee's efforts that year were spent on identifying proper committee structure and not on achieving substantive results. For example, the committee succeeded in establishing a Council of Spanish-speaking Program Coordinators and participating in meetings of a subcommittee on women. The committee also arranged for briefings of agency employees by CSC officials on equal employment opportunity.[169] CSC in its evaluation, however, did not criticize the committee for its meager results.[170]

The objectives for fiscal year 1976 again focused on organizational matters and not on eliminating discrimination.[171] The committee aims were to hold several meetings and to develop a roster of Federal EEO officers. As of March 1976, the roster had not been distributed as planned.[172]

The Spanish Speaking Program Coordinators Council, which operated somewhat independently of the committee,[173] was successful in accomplishing a number of its more significant objectives. The council, for example, sponsored a series of meetings between Federal agencies and organizations concerned with the civil rights of persons of Spanish origin, such as the G.I. Forum and the League of United Latin American Citizens (LULAC). The council also conducted presentations to college students on the Federal employment entrance examination, PACE,[174] and sponsored a job fair for high school students. As of April 1976 the council was attempting to determine whether these efforts had resulted in any increase in the hiring of candidates of Spanish origin.[175] A bimonthly newsletter to all Dallas area Spanish-speaking program coordinators was also initiated by the council.[176]

The Dallas-Fort Worth FEB has maintained a separate committee on the Federal Women's Program. During fiscal years 1975 and 1976 the committee coordinated activities of Federal Women's Program coordinators and provided resources by conducting education and training that would otherwise not be available.[177] In fiscal year 1975 the committee conducted 4 career development seminars, gave 15 briefings to agency regional heads, hosted a Regional Women's Program Conference,[178] and established a film library of women's topics for use by all agencies.[179]

The committee's objectives for fiscal year 1976, like those of the previous year, were not results-oriented. Plans called for presenting a 1-day conference emphasizing International Women's Year,[180]

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[167] Dallas-Fort Worth Federal Executive Board, *Annual Report: Fiscal Year 1975*, at 38 (remarks of George L. Dunbar, chairperson EEO committee) [hereinafter referred to as *Dallas FEB FY '75 Annual Report*].

[168] *Id.* at 39.

[169] *Id.* and telephone interview with Elizabeth Canfield, executive assistant, Dallas-Fort Worth FEB, Mar. 24, 1976.

[170] CSC evaluation, *supra* note 132.

[171] Dallas-Fort Worth Federal Executive Board, *Work Plan for Fiscal Year 1976*, at 24-26 [hereinafter referred to as *Dallas FEB FY '76 Work Plan*].

[172] Canfield interview, *supra* note 169. Most of the scheduled meetings had been held, however. *Id.*

[173] Telephone interview with Jose Cano, chairperson, Spanish-Speaking Program Coordinators Council, Dallas-Fort Worth FEB, Feb. 24, 1976.

[174] The Professional and Administrative Careers Examination (PACE) is described in *To Eliminate Employment Discrimination*, *supra* note 99, at 45-49.

[175] Telephone interview with Jose Cano, Dallas-Fort Worth FEB, Apr. 8, 1976. Mr. Cano indicated that the regional office of the Civil Service Commission had refused to furnish the council any information regarding Spanish origin candidates who had taken the PACE examination or to provide any information regarding the 500 applications for worker-trainee positions the council had submitted to the CSC. He further indicated that the CSC refusal was pursuant to provisions of the Privacy Act of 1974. In an effort to obtain some information about its efforts, the council was in the process of sending questionnaires to the 200 college students who took the PACE examination and to the 500 high school students who attended the job fair to determine how many were placed on CSC registers.

[176] The Dallas FEB noted that the Council received recognition by the Civil Service Commission for its achievements in fiscal year 1976. Specifically, OMB wrote to this Commission:

> Dallas believes the numerous seminars and workshops sponsored by FEB's [Minority Business Opportunity Committee] MBOC, and the [Spanish Speaking Program Coordinators] SSPC Council with assistance from the CSC have had a positive impact on the minority community progress in general, and on the minority entrepreneurs in particular, in the Dallas-Fort Worth metroplex, especially in FY 76. The SSPC Council and the MBOC received national recognition by the Civil Service Commission and by OMBE for their respective outstanding achievements in FY 76. Oaxaca letter, *supra* note 10.

MBOCs are discussed in section III(C) *infra*.

[177] Telephone interview with Diana Dutton, chairperson Women's Program Committee, Dallas-Fort Worth FEB, Feb. 24, 1976 [hereinafter referred to as Dutton interview].

[178] *Dallas FEB FY '75 Annual Report*, *supra* note 167, at 52-53.

[179] *Id.* OMB stated, "There may have been extenuating circumstances why the roster had not been distributed as of March 1976. The fiscal year at that time still had several months remaining." Oaxaca letter, *supra* note 10. OMB did not state if, or when, the roster was distributed or what, if any, extenuating circumstances existed.

[180] The conference was held in November 1975 and centered around a luncheon followed by a play presented by a local theater group. The conference also included exhibits showing agency activities related to International Women's Year. The event was judged successful because it was attended by 200 persons. Dutton interview, *supra* note 177. The Dallas FEB noted:

> There is no mention that the FEB Women's Committee had the distinction of hosting the 2nd National FEB Women's Program Conference in FY 74. The Commission's comment that the Committee's FY 76 objectives were not results-oriented and that it judged the November 1975 event successful because 200 persons attended is well taken. This constructive criticism is being addressed in FY 77 when the Committee will survey participants and the employing agency and analyze responses to evaluate the extent the previous six

expanding the use of the committee's film library, and hosting the Annual Women's Program Regional Conference.[181]

New Orleans

As of March 1976, the New Orleans FEB had failed to maintain a viable committee on equal employment, let alone accomplish any gains in this important area. A committee formed in 1974 dissolved upon the resignation of its chairperson,[182] and the successor committee established in fiscal year 1975 disintegrated when its members could not agree on project objectives.[183]

The New Orleans FEB maintained a separate committee on the Federal Women's Program. This committee focused primarily on sponsoring seminars and social events rather than carrying out projects directly aimed at improving the employment status of women in Federal agencies. Seminars carried out in fiscal year 1975, for example, covered such topics as career development for women, crimes affecting women, rights of women in employment in Louisiana, and Federal law affecting women.[184] Social activities scheduled by the committee included a boat ride, a fashion show, and a program on entertainment and dress.[185] The committee planned a few other projects, such as a statistical survey of the status of women in Federal agencies,[186] but none of these had been implemented as of March 1976.[187]

San Francisco

The San Francisco FEB's Equal Opportunity Committee, according to the Board's annual report,[188] was inactive during fiscal year 1975. Only the subcommittee on the Federal Women's Program reported any activities, most of which were not completed. Its plans for establishing a scholarship fund and a speakers bureau, for example, were dropped.[189] The subcommittee began a statistical survey of women and minorities employed in Federal agencies[190] but failed to complete the project.[191] Apparently, the only objective the subcommittee accomplished in fiscal year 1975 was sponsoring a 3-day film festival.[192]

The San Francisco FEB's work plan for fiscal year 1976 projected a more ambitious effort by its Equal Opportunity Committee and Subcommittee on Women. At the end of the third quarter of the fiscal year, however, many of the objectives had not been accomplished, although most had been targeted for completion by that time. For example, the committee had planned to assist in the implementation of agency affirmative action plans[193] but had not begun this project as of March 1976.[194] Nor had the committee conducted its planned statistical analysis of agency work forces.[195] The committee's goals for conducting training seminars were implemented merely by holding committee meetings at which discussion concerning EEO took place.[196]

The fiscal year 1976 objectives of the subcommittee on women focused primarily on sponsoring informational seminars. One of the more significant objectives adopted by the subcommittee was to study and make recommendations concerning flexible working hours or "flexi-time."[197] In the fall of 1975, the subcommittee recommended to the full board that each agency adopt flexi-time schedules on an experimental basis. As a result of this recommendation, two agencies, the Department of Health, Education, and Welfare and the Internal Revenue Service instituted flexible working hours.[198] As of

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Regional training conferences may have contributed to the advancement of FWP objectives. Oaxaca letter, *supra* note 10.

[181] *Dallas FEB FY '76 Work Plan, supra* note 171, at 30–32.

[182] Telephone interview with Felix Bethancourt, executive assistant, New Orleans FEB, Mar. 23, 1976.

[183] Telephone interview with Patricia Fields, chairperson, EEO Committee, New Orleans FEB, Mar. 23, 1976.

[184] New Orleans Federal Executive Board, *Annual Report: FY 1975* and *Work Plan: FY 1976* at Federal Women's Program section [hereinafter referred to as *New Orleans FEB FY '75 Report* and *FY '76 Work Plan*].

[185] *Id.*

[186] *Id.* Other projects included developing a listing of day care centers and a cancer detection health service.

[187] Telephone interview with Mary Cazales, chairperson, Federal Women's Program Committee, New Orleans FEB, Feb. 25, 1976.

[188] San Francisco Federal Executive Board, *Annual Report: Fiscal Year 1975*, at 27–29 (1975) [hereinafter referred to as *San Francisco FEB FY '75 Annual Report*].

[189] *San Francisco FEB FY '75 Annual Report, supra* note 188, at 29; and telephone interview with Glenda Johnson, cochairperson, Equal Opportunity Committee, San Francisco FEB, Mar. 24, 1976.

[190] *Id.*

[191] Johnson interview, *supra* note 189.

[192] *San Francisco FEB FY '75 Annual Report, supra* note 188, at 29.

[193] San Francisco Federal Executive Board, *Work Plan: Fiscal Year 1976*, at 37 [hereinafter referred to as *San Francisco FEB FY '76 Work Plan*].

[194] Johnson interview, *supra* note 189.

[195] *Id.* An analysis of agency employment of persons of Spanish origin was, however, conducted by the Spanish Speaking Program Coordinators' Council under the auspices of the Civil Service Commission. The Council was not affiliated with the FEB. *Id.*

[196] *Id.* Other fiscal year 1976 objectives included holding a meeting, scheduled for late April 1976, between the full board and outside civil rights organizations; informing colleges and universities of various Federal entrance examinations, such as PACE; and developing a publicity campaign on Federal equal employment opportunity programs. *San Francisco FEB FY '76 Work Plan, supra* note 193, at 37–38.

[197] Since women are more pressed with domestic responsibilities than men, usual working hours imposed by agencies can have the effect of limiting employment opportunities for women. Flexible working hours have been proposed as one mechanism for promoting employment of women. See letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights to John V. Tunney, U.S. Senate, Apr. 8, 1974.

[198] Johnson interview, *supra* note 189.

March 1976, this accomplishment appeared to be the single instance in which a San Francisco FEB project had direct impact on employment practices to improve equal opportunity. OMB stated:

> The Boston, Chicago, Dallas, New Orleans, and San Francisco FEBs all agree that the overall tone appears to indict the FEBs for failing to accord adequate attention to EEO activities. The report *grossly* distorts or emphasized facts to make the case, and presents voluminous errors which further distort the overall picture.[199]

OMB did not accurately summarize this Commission's criticism of FEB EEO activities. Our principal criticism of FEB EEO activities was that they too often failed to achieve significant results. We did not state that FEBs failed to accord adequate attention to EEO activities. Throughout this section on EEO, as we have throughout the chapter on FEBs, we have corrected any errors which OMB noted. Where there was a difference of viewpoint, OMB's viewpoint, as OMB expressed it to us, has been noted.

C. Minority Business Opportunity

In March 1969 former President Richard M. Nixon issued Executive Order No. 11458[200] announcing a national policy to foster minority business ownership and development. The order directed all Federal agency and department heads to "participate in all ways appropriate to carry out the objective of [the] order"[201] and authorized the establishment of the Office of Minority Business Enterprise (OMBE)[202] in the Department of Commerce to oversee and coordinate the Government-wide program. Approximately 1 year later in February 1970, the Director of the Bureau of the Budget[203] established Minority Business Opportunity Committees (MBOCs) within the Federal Executive Boards to assist in the implementation of the national program.[204] In 1971 Executive Order No. 11458 was superseded by Executive Order No. 11625,[205] which clarified and expanded the functions of the Department of Commerce. Included among the Department's functions was the responsibility to:

> . . .develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by [the] order.[206]

By 1975 there were standing committees on minority business enterprise in all 25 FEBs.[207] The "lead agency," OMBE, through a series of memoranda[208] and a handbook issued in July 1975,[209] established clear guidance to these committees on the development of a results-oriented program for furthering minority business opportunity.

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[199] Oaxaca letter, *supra* note 10.

[200] Exec. Order No. 11458, 3 C.F.R. 1966-1970 Comp., p. 779.

[201] *Id.*

[202] The role of OMBE is discussed in U.S. Commission on Civil Rights *Minorities and Women as Government Contractors* at 30-31 (1975) [hereinafter referred to as *Government Contractors*]. See also, U.S. House of Representatives, Committee on Small Business, *Minority Enterprise and Allied Problems of Small Business: A Report of the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business*, 94th Cong., 1st Sess. (1975) [hereinafter referred to as *House Report*].

[203] As noted in ch. 2, sec. I, the Bureau of the Budget was replaced by the Office of Management and Budget in July 1970.

[204] Office of Minority Business Enterprise, Department of Commerce, *Minority Business Opportunity Committee Handbook* at I-1 (1975) [hereinafter referred to as *MBOC Handbook*].

[205] Exec. Order No. 11625, 3 C.F.R. 779 (1971).

[206] *Id.*

[207] *MBOC Handbook*, *supra* note 204, at I-1. The Director of the Office of Minority Business Enterprise wrote to this Commission:

> I am pleased that the Commission's review has highlighted the many affirmative aspects of this program. The comments reflect the positive actions OMBE has taken over the past two years in support of an increased MBOC effort.
>
> We have completed assessment of the individual Minority Business Opportunity Committee (MBOC) Programs for FY '76. This assessment depicts very positive program growth and support from the thirty-six (36) Federal Executive Boards and Associations which maintain MBOCs.
>
> . . . . .It is important to note that MBOC performance for FY '76 is far superior to both last year's effort and the goals established for FY '76 in virtually all measurable performance areas. Quantitative examples of accomplishment for this period include the provision of over $700 million in procurement to minority business; the provision of training to nearly 60,000 minority entrepreneurs, solicitation of almost $3 billion in minority bank deposits (aggregate funds flow through); and participation in 250 trade fairs, expositions and seminars attended by over 230,000 potential and existing minority entrepreneurs. Additionally, most of the MBOCs have developed much broader and more comprehensive programs and are clearly accomplishing at a much higher level in the non-quantifiable aspects of their programs.
>
> The program continues to evidence increasing impact, and we believe as of January 1977 all MBOCs are operating at a functional level. Our ongoing efforts to strengthen the program have clearly had substantial impact and should result in even more positive results for FY '77. In keeping with the increasing impact of the program, one of OMBE's FY '77 goals is to provide local level MBOC staff support to the maximum extent feasible.
>
> We appreciate the interest the Commission on Civil Rights has taken in a program which has become increasingly important to the National minority business effort. Letter from Alex Armendaris, Director, Office of Minority Business Enterprise, Department of Commerce, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Jan. 28, 1977.

[208] See, e.g., memorandum from Kenneth Kugel, Acting Deputy Assistant Director for Field Activities, OMB, to FEB Chairmen, "Annual Report/Work Plan, Minority Business Enterprise," May 17, 1973; and Office of Minority Business Enterprise, Department of Commerce, "FY 1976 MBOC Work Plan Guidelines and Minority Enterprise Program Data Form," (undated) [hereinafter referred to as "1976 Guidelines"].

[209] *MBOC Handbook*, *supra* note 204.

Basic instructions on the scope and organization of activities were contained in the *MBOC Handbook* . These instructions were supplemented by work plan guidelines developed annually by OMBE. MBOCs were encouraged to include in their programs numerical goals for increasing the amount of Federal procurement from minority business under the Section "8(a)" program and to monitor agency progress in obtaining these goals. Under Section 8(a) of the Small Business Act,[210] the Small Business Administration of the Department of Commerce could act as a prime contractor with other Federal agencies and award subcontracts to "disadvantaged"[211] business firms, including minority-owned enterprises.[212] In addition to Section 8(a) procurement goals, MBOCs were encouraged to set numerical objectives for increasing the number of construction, concession, and small purchase contracts awarded by Federal agencies to minority businesses and for increasing the amount of Federal deposits in minority-owned banks. MBOCs were also advised to sponsor trade fairs, conferences, and seminars for providing technical assistance to minority-owned businesses and for encouraging participation by both private and public sector institutions in minority business enterprise programs.[213]

OMBE also issued detailed guidelines recommending MBOC subcommittee organization and operating procedures for carrying out the minority business enterprise goals. OMBE encouraged MBOCs to establish eight separate subcommittees on procurement, construction contracting, concessions, capital development, data and publications, education and training, public relations, and program evaluation. Moreover, OMBE delineated the recommended membership and specific activities of each subcommittee. Membership of the procurement subcommittee of each MBOC was to include representatives of SBA and all agencies having significant procurement budgets. Activities recommended for this subcommittee included locating minority businesses and assisting them in seeking SBA approval for Section 8(a) eligibility.[214]

OMBE's issuance of these guidelines is commended.[215] The direction which OMBE provided to MBOCs made it possible for these FEB committees to achieve more meaningful results than many other FEB committees, such as those on employment. However, the major deficiency in these guidelines was the failure to address the needs of female-owned businesses. Although women have been subjected to economic discrimination, especially in employment and access to credit,[216] there was no attempt to integrate into the MBOC programs any activities to increase business opportunities for women.[217]

A second deficiency in the OMBE instructions was the failure to stipulate that goals should be set in percentage terms rather than in absolute dollar amounts or number of contracts.[218] Nor did OMBE encourage MBOCs to determine what the total Federal procurement or deposit capacity was within each region or city. As a result, MBOCs did not generally collect this information.[219] There was, therefore, no means to evaluate the adequacy of the numerical goals for minority enterprise in terms of the share of total Federal procurement or deposits the goals represent.

With these exceptions, however, OMBE's guidelines provided an excellent framework for FEB activities. The extent to which different FEB MBOCs implemented the guidelines varied. OMBE's annual evaluations of MBOC activities and goals were reasonably thorough and, where critical, apparently led to some improvements.

In 1975 OMBE instituted a pilot program to improve the performance of MBOCs. The program, which was implemented in 10 MBOCs,[220] provided full-time staff support through an executive director, responsible to the MBOC chairperson and FEB chairperson, and a part-time secretary. The salaries were funded through OMBE. As of March 1976, no decision had been made whether to continue the program for the next fiscal year.[221]

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[210] 15 U.S.C. §637(a) (1970).

[211] 13 C.F.R. §124.8-1 (Supp. 1975).

[212] The Section 8(a) program is discussed extensively in *Government Contractors, supra* note 202, at 35-62; and in *House Report, supra* note 202, at 11-16, 28-30 and 34-35. In fiscal year 1974, Section 8(a) procurement represented $272.1 million, or less than one-half of 1 percent of the $56 billion in total Federal procurement. Total procurement by civilian agencies was approximately $14 billion; defense procurement was approximately $42 billion. General Services Administration, "Procurement by Civilian Executive Agencies for the Period July 1, 1973, through June 30, 1974," 1, Sept. 20, 1974; and Department of Defense, "Military Prime Contract Awards for Fiscal Years 1974 and 1975," 9, Oct. 15, 1975.

[213] *MBOC Handbook, supra* note 204; and "1976 Guidelines," *supra* note 208.

[214] *Id.* SBA criteria are discussed in *Government Contractors, supra* note 202, at 51-54.

[215] OMB stated that, "All six FEBs have disagreed with this statement." Oaxaca letter, *supra* note 10.

[216] See, e.g., *Government Contractors, supra* note 202, at 12-15, 32-33; Office of Minority Business Enterprise, U.S. Department of Commerce, *Women-Owned Businesses: 1972* (1976); and Hearings on Concerns of Women Business Owners, before the Select Committee on Small Business of the Senate, 94th Cong., 2nd Sess. (1976).

[217] The failure of the Federal Government, in general, to address the problem of discrimination against female-owned firms is discussed in *Government Contractors, supra* note 202, at 32-34. OMB stated, "It should be mentioned that OMBE requested MBOC[s] to delete "women" in FEB FY 77 Work Plan objectives statements." Oaxaca letter, *supra* note 10.

[218] OMB stated "[The] deficiency cited about OMBE failure to stipulate that MBOC goals should be set in percentage terms rather than in absolute dollar amounts or number of contracts has been eliminated." *Id* . OMB did not explain what actions had been taken to eliminate the deficiency.

[219] None of the MBOCs within FEBs studied by this Commission had this information.

[220] The 10 MBOCs selected by OMBE to participate in the pilot program

Boston

As of the beginning of fiscal year 1976, the Boston MBOC had largely failed to accomplish any significant results. During fiscal year 1975, the committee's activities were limited to participating in two trade fairs and attempting to encourage agencies to place deposits in one minority-owned bank.[222] The committee, in its annual report, conceded that it was less effective than it had hoped to be, citing the lack of leadership within the MBOC and from OMBE as the reason for the lack of substantive accomplishments.[223]

The major thrust of the Boston MBOC in fiscal year 1976 was to reorganize the committee and to channel into the Section 8(a) program at least 1 percent of the $1.5 billion available for Federal procurement in the Boston area.[224] The MBOC chairperson stated that serious barriers to the committee's success were lack of MBOC resources and lack of confidence among Federal management officials in the capabilities of minority-owned businesses. Another problem noted by the chairperson was the lack of control, at the regional or local level, over where agency deposits could be placed.[225]

Chicago

The Chicago MBOC, as of March 1976, had been reasonably successful in promoting Federal support for minority-owned business. During fiscal year 1975,[226] the committee maintained subcommittees on six of the eight topics recommended by OMBE.[227] Some of these subcommittees accomplished or exceeded their objectives. The Subcommittee on Procurement and Construction, for example, succeeded in stimulating Section 8(a) procurement to $11.6 million, more than $4 million beyond the subcommittee's goal.[228] The FEB did not know, however, what percentage of total Federal procurement in the Chicago area this amount represented.[229]

Other MBOC subcommittees were not successful. The Subcommittee on Capital Development, for example, failed to report any progress in its objective to increase Federal deposits in minority-owned banks.[230] The Concessions Subcommittee attempted

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were: Pittsburgh, San Francisco, Chicago, Los Angeles, Dallas, Atlanta, Detroit, Newark, Atlanta, and Seattle/Portland. Office of Minority Business Enterprise, "OMBE Program: To Provide Full-Time Staff Support to Ten Minority Business Opportunity Committees (MBOC's)" (undated). The main criterion for choosing these particular MBOCs appeared to be the existence of a strong program; those MBOCs which were foundering were not selected.

[221] Telephone interview with Alfred Roma, Executive Director, Minority Business Opportunity Committee Task Force, Office of Minority Business Enterprise, Department of Commerce, Feb. 10, 1976.

[222] *Boston FEB FY '75 Annual Report, supra* note 86, at Minority Business Opportunity Committee section. The committee had been only slightly more productive in previous years. For example, the Boston MBOC's performance in 1972 had few tangible results despite frequent meetings and workshops and some public relations activity. In one instance, the MBOCs, in conjunction with the regional office of the Veterans Administration, sponsored a workshop for minority enterprises, offering instruction in such matters as how to submit bids on Federal contracts. The committee concluded, however, that it was difficult to locate minority businesses which were interested in receiving technical assistance, and thus its outreach activities had been minimal. Both OMB and the Boston FEB expressed displeasure at the MBOC's lack of progress. As a result, the FEB itself attempted to provide some support to minority business enterprise. Through the FEB, two minority concessions were established in Federal buildings, one for shoe repair and one for dry cleaning. The FEB placed one-third of its funds, about $1,000, in a minority-owned bank. The account remained dormant, however, because the use of this bank was inconvenient for staff. Telephone interview with Ralph Simmons, executive assistant, Boston FEB, June 27, 1974; and interview with David Weinman, field representative, OMB, Oct. 13, 1972.

[223] *Boston FEB FY '75 Annual Report, supra* note 86, at Minority Business Opportunity Committee section. OMB commented:

> An important area of misrepresentation is where a FEB has failed to make adequate progress on a given EEO objective, and has already acknowledged failure. For instance, in the case of Boston's MBOC initiative, the FEB was very explicit in its annual report that insufficient progress had been made (due largely to inadequate support from OMBE), and outlined steps which it was taking to assure greater progress. The report presents the shortcomings as though the Civil Rights Commission had uncovered the deficiencies, and that the FEB must be prodded to correct them. Oaxaca letter, *supra* note 10.

Annual reports are referenced frequently in this chapter as sources for our statements concerning Federal Executive Board activities. We disagree that this chapter presents the shortcomings which FEBs themselves acknowledge as if this Commission had uncovered them. We particularly do not understand the example of which the FEBs allege in the case of the Boston FEB's MBOC. Both the text discussing the deficiencies of the Boston MBOC and the footnote to that section make clear that the source of our information was the FEB's annual report.

[224] Telephone interview with Quentin Taylor, chairperson, MBOC, Boston FEB, Mar. 2, 1976.

[225] *Id.* In its analysis of the Boston MBOC's activities, OMBE concluded that, although the committee appeared to have been "dormant" during fiscal year 1975, its plans for fiscal year 1976 could provide the basis for a successful program. Memorandum from Vincent Puritano, Deputy Associate Director for Intergovernmental Relations and Operations to FEB chairpersons, "Agency Analyses of FEB Annual Reports/Work Plans," Dec. 2, 1975, [hereinafter referred to as "Agency Analyses"].

[226] Prior activities of Chicago's MBOC included attempts to stress the importance of Federal agency compliance with Exec. Order No. 11625. As of March 31, 1973, the MBOC had been able to secure almost $3.5 million in Section 8(a) awards to local Chicago minority businesses. Memorandum from John W. Chapman, Jr., chairperson, Chicago FEB, to Chicago FEB members, Apr. 11, 1973.

[227] The Chicago MBOC's six subcommittees were concerned with procurement and construction, capital development, concessions, education and training, public relations and publications, and program evaluation. *Chicago FEB FY '75 Annual Report, supra* note 154.

[228] *Id.* at 1.

[229] Telephone interview with Jessie Deloch, executive director, MBOC, Chicago FEB, Mar. 25, 1976.

[230] *Chicago FEB FY '75 Annual Report, supra* note 154, at 3; and Deloch interview, *supra* note 229.

to identify three concession locations in Chicago's Federal buildings, but was unable to do so. The Education and Training Subcommittee attempted to improve its educational and training capability to respond effectively to the needs of the minority business community. The bulk of the subcommittee's efforts, however, was spent in internal assessment and planning; as a result, it conducted only one seminar on procurement and contracting. The Public Relations Subcommittee conducted a survey of the local minority business community and distributed this information at the minority business seminar held in April 1975, but was unable to publish a quarterly MBOC newsletter to the minority business community.[231]

The Chicago MBOCs work plan for fiscal year 1976 called for a continuation of the prior year's programs with more emphasis on developing training for the minority business community.[232] The Section 8(a) procurement goal for fiscal year 1976 was almost obtained by the middle of the fiscal year.[233] The relative success of the Chicago MBOC, compared with its counterpart in Boston, was due in part to its having been selected as one of the 10 committees to participate in the OMBE pilot program.

Dallas

The program of the Dallas MBOC suffered from a failure to set numerical, results-oriented objectives. During fiscal year 1975,[234] the committee's goals and accomplishments were largely limited to sponsoring a seminar and a trade fair.[235] The MBOC also began to assess the possibilities of increasing Federal deposits in minority-owned banks but did not stimulate any deposits other than a small amount placed by the committee itself.[236] Another activity of the MBOC was to encourage Federal agencies to appoint "8(a) monitors" in their procurement offices to identify agency procurement needs that could be satisfied by contracts channeled into the Section 8(a) program.[237] As a result of its efforts, 23 agencies appointed monitors.[238]

For fiscal year 1976, the Dallas MBOC planned broader and, to some extent, more quantified objectives. This development may have been due to strong criticism by OMBE in its evaluation of the MBOC's previous year's activities.[239] The Dallas FEB noted that the MBOC received national recognition by OMBE for its achievements in fiscal year 1976.[240]

The committee's goals for Section 8(a) procurement was set at $11 million,[241] approximately $6 million of which had been accomplished by mid-fiscal year.[242] The MBOC did not set a numerical goal for increasing deposits in minority-owned banks but focused its attention on forming a subcommittee, obtaining information on the availability of Federal funds for deposit, and publicizing the MBOC's bank deposits program among Federal agencies and minority-owned financial institutions.[243] Other objectives for fiscal year 1976 included sponsoring three seminars and conducting an evaluation of the MBOC program; as of March 1976, neither goal had been accomplished.[244]

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[231] *Chicago FEB FY '75 Annual Report, supra* note 154, at 1-8.

[232] *Chicago FEB FY '76 Work Plan, supra* note 163, at 1-2.

[233] Deloch interview, *supra* note 229. The goal for Section 8(a) procurement was $8.8 million; as of December 1975, contracts valued at $8.2 million had been set aside for the Section 8(a) program. *Id.*

[234] Prior Dallas MBOC activities included establishing a minority business directory, providing active support to two groups—one black and one Mexican American—in their efforts to obtain charters for minority-owned banks in the Dallas-Fort Worth area, providing information about Federal contracting and procurement to local minority businesspersons, and sponsoring training seminars on Federal contracting to local minority businesses. Dallas-Fort Worth FEB, *Semi-Annual Report: Fiscal Year 1973* at 6.

[235] The seminar, entitled "How to do Business with the Government," was held in June 1975 with 95 participants from the local minority business community. The committee also co-sponsored with the Dallas-Fort Worth Regional Minority Purchasing Council the third annual Minority Business Trade Fair on May 29, 1975. At the fair, 120 minority vendors displayed their products and services to more than 500 corporate purchasing executives. *Dallas FEB FY '75 Annual Report, supra* note 167, at 8.

[236] The committee opened one account in the amount of $2,262 for its trade fair expenses. *Id.* at 9.

[237] The role of Section 8(a) monitors is briefly described in *MBOC Handbook, supra* note 204, at III-1.

[238] *Dallas FEB FY '75 Annual Report, supra* note 167, at 17.

[239] OMBE's analysis of the Dallas-Fort Worth MBOC's annual report for fiscal year 1975 concluded that it was unsatisfactory because it did not report quantifiable data and because the scope of the plan was extremely limited. OMBE criticized the program for concentrating only on sponsoring a trade fair and seminar while limiting the activities for increasing 8(a) procurement and bank deposits merely to promotional efforts. "Agency Analyses," *supra* note 225. OMBE evaluated the fiscal year 1976 plan as satisfactory because they expanded the prior year's efforts; but OMBE qualified the satisfactory rating as barely adequate because the plans were very general in nature. *Id.* The Dallas FEB reported, "The MBOC submitted a revised work plan for FY 76 which was acceptable to OMBE." Oaxaca letter, *supra* note 10.

[240] This recognition is mentioned in note *supra* 239.

[241] *Dallas FEB FY '76 Work Plan, supra* note 171, at 7.

[242] Telephone interview with Thomas Hawkins, executive director, MBOC, Dallas-Fort Worth FEB, Mar. 25, 1976.

[243] *Dallas FEB FY '76 Work Plan, supra* note 171, at 8.

[244] Hawkins interview, *supra* note. The Dallas FEB noted that "MBOC's objective for the three seminars were met in FY 76 and the Dallas MBOC was a recipient of one of two awards for outstanding achievement at OMBE's 6th Annual MBOC Conference in Chicago in October." Oaxaca letter, *supra* note 10.

New Orleans

Although at one time the New Orleans MBOC appeared to be making meaningful gains,[245] as of March 1976 the committee had completely disintegrated. Only two objectives were set for fiscal year 1975.[246] The first was to increase Federal deposits in the single minority-owned bank in New Orleans. Three of the 40 Federal agencies in New Orleans participated in the program.[247] The second objective was to conduct training for the minority business community on Federal procurement and marketing techniques. In conjunction with the Management Assistance Division of the Small Business Administration, the committee conducted 10 workshops throughout Louisiana, attended by 300 minority business persons.[248]

Despite OMBE's criticism that the committee's program goals were too narrow,[249] the same two objectives were continued for fiscal year 1976.[250] By October 1975, as a result of declining membership interest and the chairperson's lack of time to devote to the program, the New Orleans MBOC had become defunct.[251]

San Francisco

The San Francisco MBOC's fiscal year 1975 objectives[252] included seeking out viable concessions, coordinating and conducting special events such as trade fairs, developing a minority vendors program emphasizing Section 8(a) procurement, encouraging deposits in minority-owned financial institutions, and conducting educational and training opportunities for minority business persons.[253]

The actual accomplishments included surpassing the Section 8(a) procurement goal of $14.5 million by almost $1 million with an additional $5 million obtained through modifications contracts for a total of $20.3 million.[254] The MBOC also developed a continuing program with the San Francisco Unified School District to set aside for minority contractors a $40 million contract[255] to make school buildings earthquake proof. In addition, the MBOC conducted 82 workshops in fiscal year 1975 for various minority business groups, sponsored a minority business conference with 450 participants, and generated nearly $20 million in competitive Federal procurement contracts through direct sponsorship of two minority trade fairs.[256]

The MBOC's plans for fiscal year 1976 stressed four objectives: (1) to increase procurement by Federal, State, and local governments from minority-owned businesses, (2) to achieve $60 million in deposits with minority-owned financial institutions, (3) to coordinate and conduct educational workshops directed at specific problems of the minority business community, and (4) to promote concessions and trade fairs to aid the minority business community.[257] OMBE found the San Francisco MBOC's activities and plans satisfactory but criticized the committee for not providing enough quantifiable data in its report.[258]

Of the five MBOCs studied by this Commission, it appears that all, within varying degrees, suffered as a result of the voluntary nature of the FEB structure.[259] The demands of a member's regular job at times prevented full participation, and therefore many projected goals were unaccomplished.[260]

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[245] New Orleans MBOC activities during fiscal years 1972 and 1973 concentrated on fostering the steady growth of minority-owned and directed businesses in metropolitan New Orleans and in the State of Louisiana as a whole. The most active of the MBOC's four subcommittees was the procurement subcommittee which was able to generate for minority businesses $414,000 in Section 8(a) contracts and $3 million in competitive procurement contracts. The MBOC felt that its activities were quite successful until fiscal year 1974, at which time the MBOC chairman for the 3 preceding years resigned. The OMBE regional director then assumed the role of acting chairperson, but due to a major reorganization of his office, he had little time for effectively directing MBOC activity. Telephone interview with Felton Sneed, acting MBOC chairperson, New Orleans FEB, and regional director of the New Orleans Office of Minority Business Enterprise, July 26, 1974.

[246] *New Orleans FEB FY '75 Annual Report, supra* note 184, at Minority Business Opportunity Committee section.

[247] The committee acknowledged that the participation was unsatisfactory. *New Orleans FEB FY '75 Annual Report, supra* note 184, at Minority Business Opportunity Committee section.

[248] *Id.*

[249] "Agency Analyses," *supra* note 225.

[250] *New Orleans FEB FY '76 Work Plan, supra* note 184, at Minority Business Opportunity Committee section.

[251] Telephone interview with Pierre Charles, chairperson, MBOC, New Orleans FEB, Mar. 4, 1976.

[252] In previous years the San Francisco MBOC was also very active. The MBOC was one of the sponsors of the 1972 Bay Area Minority Business Seminar and Trade Fair and made numerous contacts with local Federal agencies, stressing the importance of complying with Exec. Order No. 11625. During the first half of fiscal year 1973, Section 8(a) contracts awarded to minority firms totaled $4.6 million. San Francisco FEB, *Semi-Annual Report*, at Minority Business Opportunity Committee section, Jan. 3, 1973.

[253] *San Francisco FEB FY '75 Annual Report, supra* note 188, at 17–22.

[254] *Id.*

[255] This program was to be conducted in conjunction with and through the regional office of the SBA.

[256] *San Francisco FEB FY '75 Annual Report, supra* note 188, at 22.

[257] *San Francisco FEB FY '76 Work Plan, supra* note 193, at 2 and 11–14.

[258] "Agency Analyses," *supra* note 225.

[259] *Id.*

[260] OMB stated:

> The Commission Report starts the draft Chapter [4] discussion of Federal Executive Boards with an accurate and key assertion about FEBs: they "are voluntary associations." The import of that fact is quickly lost as the Commission proceeds, and, if the Chapter is to gain

Three of the five MBOCs studied by the Commission, Chicago, Dallas-Fort Worth, and San Francisco, were selected by OMBE as pilot program recipients, and two, Boston and New Orleans—apparently due to their prior poor performance—were not selected.[261]

While it appears that providing a full-time executive director to provide continuity and administrative support to an already relatively successful MBOC operation is somewhat helpful, a better test of the efficacy of OMBE's pilot program would be to provide those MBOC's having a history of difficulty with precisely the resources which they most require.

D. Other FEB Activities

In addition to those committees and programs having direct civil rights implications, there are other FEB activities which are not civil rights activities, but which could have a significant impact on minorities and women. Three such activities are evaluated in this section. For the most part, however, concerns of minorities and women have not been integrated into these programs.

1. Fund Raising

FEBs generally raise funds for charitable purposes through the Combined Federal Campaign.[262] Although this charitable endeavor was not an OMB-mandated objective,[263] most FEBs actively supported it.[264] In this campaign Federal employees were given a list of charitable and nonprofit institutions and asked to make a contribution to one or more on the list. As a result of FEB efforts, millions of dollars were raised each year.[265] CSC noted that:

> . . Responsibility for determining the arrangements under which voluntary agencies may solicit funds from Federal employees rests with the Chairman, Civil Service Commission.
>
> Funds donated through the Combined Federal Campaign are distributed to three broad groups of charitable organizations: local United Funds, including the American Red Cross, the National Health Agencies, and the International Service Agencies. Further division of funds among the individual agencies in each of these groups is made by the groups themselves on the basis of designations and internal agreements among the voluntary agencies. Allocations of funds among member agencies of local united funds are determined locally, based on individual voluntary agency and community needs, by budget committees and boards of directors composed of members of the community.[266]

There was some criticism that the funds provided through the Combined Federal Campaign were not distributed on a nondiscriminatory basis.[267] Yet most of the FEBs studied by this Commission did not appear to have a formal mechanism to ensure

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real meaning the voluntariness of FEB activity must be woven actively into all of the pages of Chapter [4]. It does not suffice to mention it in the first sentence and then drop it. Oaxaca letter, *supra* note 10.

This Commission notes that the voluntary nature of the FEBs is discussed in the text above and in several other sections of the report. See, e.g., the initial paragraphs of secs. II and III *supra*.

[261] The three MBOCs are Chicago, Dallas-Fort Worth, and San Francisco. Boston and New Orleans were not selected for the program. See also text accompanying note 221 *supra*.

[262] The Combined Federal Campaign is a unified effort by Federal agencies to raise funds for charitable organizations under the auspices of the United Way Fund. Fundraising activities are conducted throughout the entire Federal Government, although a large number of charitable agencies for which funds are raised are local, and, thus, the list of recipients of the campaign varies from city to city.

[263] For a more detailed discussion of OMB directives see sec. I(B) *supra*.

[264] Each of the five FEBs studied had Combined Federal Campaign committees.

[265] For example, in fiscal year 1975, the following amounts were raised: Boston, $672,000, telephone interview with Frank Prout, Boston FEB executive assistant, Apr. 9, 1976; Chicago, $964,000, *Chicago FEB FY '75 Annual Report*, *supra* note 154, at 33; Dallas-Fort Worth, $830,383, *Dallas-Fort Worth FEB FY '75 Annual Report*, *supra* note 167, at 83; New Orleans, $302,859, *New Orleans FEB FY '75 Annual Report*, *supra* note 184, at Combined Federal Campaign section; San Francisco, $1,249,718, telephone interview with Cynthia Gray, San Francisco FEB executive assistant, Apr. 9, 1976.

[266] Jacobson letter, *supra* note 100.

[267] Telephone interview with Sandra Jenkins, board of directors, National Organization for Women Legal Defense and Education Fund, and member of District of Columbia United Way Allocation Committee, Apr. 7, 1976. Telephone interview with Gilberto Chavez, national president of IMAGE, (a National organization of Federal, State, and Municipal employees of Spanish origin), Apr. 15, 1976. IMAGE also criticized the United Way for not soliciting funds for Hispanic charities and advocated a boycott of the United Way in 1975.

nondiscrimination in the distribution of the funds.[268] CSC, in response, stated:

> Voluntary agencies which receive contributions from Federal employees through the Combined Federal Campaign must maintain a policy and practice of nondiscrimination. Each voluntary agency participating in CFC is required to furnish written assurance that there is no discrimination on the basis of race, color, religion, sex, or national origin in the provision of services, in staff employment, and in membership on governing boards. In addition, each participating agency must have a written plan for affirmative action in employment.[269]

Nonetheless, further Federal attention to the distribution of Combined Federal Campaign funds would have been appropriate. Beyond attention to the nondiscrimination policies of individual voluntary agencies, there should have been a review of the distribution of funds to those agencies to ensure that the interests of minorities and women were adequately represented. FEBs might have appropriately undertaken such a task for their own localities.

2. Information and Referral Project

In response to a request in 1974 by the Administration on Aging[270] of the Department of Health, Education, and Welfare, OMB provided guidance to all FEBs to assist area agencies on aging to further develop information and referral systems for the elderly.[271] The Information and Referral Project, designated a national priority for fiscal year 1975, consisted of compiling information about all public and private service agencies at the Federal, State, and local levels which affect or could affect older Americans. The program was designed to enable older persons seeking assistance to be referred promptly and accurately to the appropriate organization.[272]

This referral service could have significant potential in alleviating some of the problems of older Americans, particularly those special problems of older women and minority groups.[273] In 1975 the Administration on Aging, as the lead agency, encouraged FEBs to address the special problems of older women in commemoration of International Women's Year.[274] No similar guidance, however, was provided regarding minority elderly persons.[275]

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[268] *Boston FEB FY '75 Annual Report, supra* note 86, at Combined Federal Campaign Committee section. *Chicago FEB FY '75 Annual Report, supra* note 154, at 33; *Dallas-Fort Worth FEB FY '75 Annual Report, supra* note 167, at 83; *New Orleans FEB FY '75 Annual Report, supra* note 184, at Combined Federal Campaign Committee section; and *San Francisco FY '75 Annual Report, supra* note 188, at 37-38. In 1972 the Boston FEB fundraising committee attempted to determine whether or not the minority community was receiving equitable benefits from the funds raised. Interview with Ralph Simmons, executive secretary, Boston FEB, Nov. 13, 1972. The list of recipients was never formally assessed, however, nor were statistics ever requested or shown as supportive evidence that minority organizations were, in fact, receiving an equitable share of the funds.

In 1972 minority Federal employees, especially from the Office of Economic Opportunity (OEO), claimed that there was not sufficient allocation of funds from the United Way Fund for minority organizations and participated in a counterdrive. Those Federal agencies sponsoring the United Way Fund strongly objected, stating that minorities were not required to contribute to the fund, especially if they objected to how the monies were being distributed. Telephone interview with Ralph Simmons, executive secretary, Boston FEB, July 25, 1974.

The Boston FEB noted that:

> The United Way subsequently established a special Task Force to examine this issue. As a consequence, several minority organizations, Black and Hispanic, were included in the United Way allocations. United Way also established a policy of nondiscrimination and consequently, reviews its own activities and those of client agencies for evidence of discrimination. The Boston FEB is represented on the United Way Allocation Committee which enforces this policy.

Oaxaca letter, *supra* note 10.

The Boston FEB did not provide information as to how the United Way reviewed its own activities and thus this Commission cannot comment as to whether the United Way review constitutes a formal mechanism to ensure nondiscrimination. The Dallas FEB reported that, "Based on knowledge and experiences with United Way in Dallas and Fort Worth, UW adheres to a non-discriminatory policy in distributing the CFC contributions by Federal employees." *Id.* Personal knowledge and experience, however, are no substitutes for regular objective assessments of the distribution of Combined Federal Campaign funds.

[269] Jacobson letter, *supra* note 100.

[270] Memorandum from Arthur S. Flemming, Commissioner, Administration on Aging, HEW, to Vincent Puritano, Deputy Associate Director, Intergovernmental Relations and Regional Operations Division, OMB, Mar. 18, 1974. The Administration on Aging is charged with the responsibility for implementing the Older Americans Act as amended by the Older Americans Amendments of 1975, 42 U.S.C. §3001 *et seq.* (Supp. V, 1975), The Amendments call for the creation of a network of information in response to inquiries of older persons.

[271] Memorandum from Vincent Puritano, Deputy Associate Director, Intergovernmental Relations and Regional Operations, Office of Management and Budget, to FEB chairpersons, Aug. 20, 1974.

[272] *Id.*

[273] For a discussion of the unique problems of the older females see Sommers, "The Compounding Impact of Age on Sex," 7 *Civil Rights Digest* 2 (1974).

[274] Memorandum from Arthur S. Flemming, Commissioner, Administration on Aging, HEW, to FEB chairpersons, Aug. 14, 1975 [hereinafter referred to as Flemming memorandum].

[275] For example, the Chicago FEB's task force for the elderly distributed 50,000 copies of a consumer's guide and distributed to Federal agencies in Chicago a listing of Federal, State, local, and private assistance agencies. *Chicago FEB FY '75 Annual Report, supra* note 154, at 13-15. Fiscal year 1976 goals included updating the directory, training information and referral personnel in dealing with the elderly, and making Federal officials aware of the special problems faced by the elderly relating to rising energy costs. *Chicago FEB FY '76 Work Plan, supra* note 163, at 18. The Dallas-Fort Worth FEB's information and referral committee also distributed an intergovernmental directory of services to agencies in the metropolitan area and trained 88 persons from various agencies on information and referral systems. *Dallas-Fort Worth FEB FY '75 Annual Report, supra* note 167, at 3-6. Similarly, fiscal year 1976 plans called for development of plans to meet energy problems of the elderly, continuation of training, and assessments of the information and referral directories published. *Dallas-Fort Worth FEB FY '76 Work Plan, supra* note 171, at 13-15. The New Orleans FEB task force on information and referral distributed to public and private agencies a directory of Federal services for the elderly and conducted training in the use of the directory for employees of private and public agencies. *New*

As of April 1976, the FEBs studied by the Commission had not on their own initiative made special provision for the unique needs of minorities, nor had they taken into account in their information and referral programs the special needs of women.[276] In the opinion of the Administration on Aging, however, the nationwide program of the FEBs did make a contribution to the achievement of the goal of improving information and referral services for older persons.[277] FEBs were less than fully responsive to the Administration on Aging's suggestions in commemoration of International Women's Year. The one exception[278] was the program of the New Orleans FEB, which provided a 24-hour telephone service with bilingual personnel to provide assistance and information to elderly persons of Spanish origin.[279] The New Orleans FEB was also the only board studied whose information and referral committee included goals in its work plan for fiscal year 1976 concerning the special needs of women.[280] Three FEBs, responding through OMB, indicated that:

> The Boston [Chicago and San Francisco] FEB[s] reviewed [their] information and referral program[s] and found [them] to be in compliance with the requirements of the Administration on Aging. Since the majority of elderly persons are women, any referral program designed to serve the elderly necessarily serves elderly women.[281]

Since the Administration on Aging's guidance with respect to International Women's Year was advisory rather than mandatory, the assertions by these three FEBs may have been true but not directly relevant to this Commission's criticism. We note that in December 1975, the Administration on Aging stated concerning the San Francisco FEB's FY 1976 Work Plan: "Omission of [a]. . .response to the 'International Women's Year and Older Women' suggests that some effort should be made to reassess the possibility of including them in the Work Plan."[282] Similiar remarks were made concerning the lack of attention to elderly women in the work plans of the Boston and Chicago FEBs.[283]

This Commission takes strong exception to the contention of the Boston, Chicago, and San Francisco FEBs that "Since the majority of elderly persons are women, any referral program designed to serve the elderly necessarily serves elderly women."[284] Simply reviewing the lead agency's requirements and coming to the conclusion that past activity is sufficient without specific planning for the special needs of elderly women is not, in this Commission's opinion, responsive to that group. Among the suggestions made by the Administration on Aging to be included as part of regular program activities during International Women's Year were:

—workshops concerned with problems of widowhood and/or preparation for widowhood; among the elderly there were 134 females per 100 males and among the 35+ group there were 202 females per 100 males.

—special preparation for retirement programs for employed women; every day approximately 4,000 Americans celebrate their 65th birthdays.

—special recognition for older Federal women employees who are devoting time to community activities helpful to others.

Orleans FEB FY '75 Annual Report, supra note 184, at Information and Referral Resources for the Elderly and Consumerism section.

[276] For example, income is a major concern of black elderly. Approximately 80 percent of black women over age 65 have an annual income of less than $2,000. Many of these women work as domestics and do not have social security deducted from their wages. As a result, they are unable to receive social security benefits. Another problem of black elderly is access to nursing homes. There is discrimination in admittance of black patients, who constitute only 2 percent of nursing home residents across the country. Telephone interview with Delores Davis, executive director, National Center on Black Aged, Apr. 15, 1976. See also, *Washington Post*, Apr. 25, 1976, (*Parade Magazine*), at 12.

The special needs of Asian American, Spanish Origin, Black, and Native American elderly are discussed in Proceedings of the 1971 White House Conference on Aging, "Toward a National Policy on Aging," Final Report, vol. II, (1971), pp. 159-197. For a further discussion of the special needs of elderly women, see Sommers, "The Compounding Impact of Age on Sex," 7 *Civil Rights Digest* 2 (1974); and U.S. Commission on Civil Rights, *Women and Poverty* (June 1974).

[277] Letter from Arthur S. Flemming, Commissioner, Administration on Aging, HEW, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Apr. 22, 1977.

[278] In 1974 the Boston FEB Minority Opportunity Committee had as an objective providing information on Federal services to older minority persons. (See note 124 *supra* .) However, the *Boston FEB FY 1975 Annual Report* noted that this objective was discontinued and that plans to assist the elderly would be coordinated by the Community Services Committee. *Boston FEB FY '75 Annual Report* , *supra* note 86, at Minority Opportunity section.

[279] *New Orleans FEB FY '75 Annual Report, supra* note 184, at Information and Referral Resources for the Elderly and Consumerism section.

[280] *New Orleans FEB FY '76 Work Plan, supra* note 184, at Information and Referral Resources for the Elderly and Consumerism section.

[281] Oaxaca letter, *supra* note 10.

[282] Office of Human Development, Administration on Aging, HEW, "Lead Agency Review, Work Plans 1976, San Francisco, California [FEB]," Dec. 15, 1975.

[283] Office of Human Development, Administration on Aging, HEW, "Lead Agency Review, Work Plans 1976, Boston, Massachusetts, Federal Executive Board," Nov. 17, 1975, and Office of Human Development, Administration on Aging, HEW, "Lead Agency Review—AOA, Work Plans 1976, Chicago, Illinois [FEB]," Nov. 17, 1975.

[284] Oaxaca letter, *supra* note 10.

—public hearings on problems of older women and how the community might help in meeting them[285]

3. Consumer Affairs

Until the beginning of fiscal year 1975, OMB designated consumer affairs as a national priority program for FEBs.[286] Despite OMB's deemphasis, three of the five FEBs studied by the Commission continued to maintain standing committees on consumer affairs.[287]

The Office of Consumer Affairs of HEW, as the lead agency, outlined three objectives for fiscal year 1975, few of which were accomplished by the FEBs: 1) assisting the elderly consumer, 2) developing contingency plans to assist consumers in disaster areas, and 3) establishing community consumer councils.[288] No guidance was provided regarding the special consumer needs of minorities or women.

As a result, most of the FEB programming was directed toward middle-income families, rather than the low-income female and minority population who experience severe hardships as consumers. Higher prices are charged and less credit is extended in low-income neighborhoods, and it is these neighborhoods where most women in poverty and minorities reside. They must either pay higher prices or incur the cost of public transportation to other areas where consumer products are more reasonably priced.[289]

The Boston FEB was the only FEB reviewed by this Commission with consumer affairs accomplishments specifically directed at minority groups. In 1975 the Boston FEB developed a series of radio and television consumer reports in Spanish.[290] The Boston FEB also noted that "During FY 1976, hearings were held by the Boston FEB to determine the effectiveness of Federal consumer programs on low income and minority groups."[291] The Dallas FEB's attempt to translate into Spanish a consumer services directory failed.[292]

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[285] Flemming memorandum *supra* note 274.

[286] Telephone interview with Karen Sagett, OMB, Apr. 9, 1976.

[287] The three FEBs continuing the program were Boston, Chicago, and Dallas-Fort Worth. See 1976 work plans of these FEBs.

[288] Office of Consumer Affairs, HEW, *Consumer Affairs, FY '75 Optional Theme*, May 1974. The Boston FEB's efforts in fiscal year 1975 consisted mainly of providing consumer reports through newspapers, television, radio, slide presentations, and exhibits, *Boston FEB FY '75 Annual Report*, *supra* note 86, at Consumer Affairs Committee section. The Chicago Consumer Issues Committee was to prepare and distribute to all Federal agencies an index of Federal programs that would have impact on the consumer and develop publicity suggestions for those agencies having consumer programs. Neither objective was accomplished in fiscal year 1975 and both were carried over for completion into fiscal year 1976. *Chicago FEB FY '75 Annual Report*, *supra* note 154, at 13–15. The Dallas FEB concentrated on subsidizing a new listing of consumer agencies in the telephone book and cosponsoring a consumer conference. The conference was held, but the listing was not completed. *Dallas-Fort Worth FEB FY '75 Annual Report*, *supra* note 167, at 3–4.

[289] For a further discussion of consumer problems encountered by minorities and low-income persons, see D. Caplovitz, *The Poor Pay More—Consumer Practices of Low-Income Families* (1963); House Comm. on Government Operations, *Consumer Problems of the Poor: Supermarket Operations in Low-Income Areas and the Federal Response* , House Rpt, No. 1851, 90th Cong., 2d Sess. (1968); and *Report of the National Advisory Commission on Civil Disorders* 139–41 (1968); and *Women and Poverty*, *supra* note 276.

[290] *Boston FEB FY '75 Annual Report*, *supra* note 86, at Consumer Affairs Committee section. The Boston FEB provided further detail:

> The television series developed and aired by the Boston FEB in FY 1975 was a series of fourteen, thirty minute shows on the only regularly scheduled, Spanish language program in New England. This program reaches all Spanish speaking areas in Massachusetts and Rhode Island. Oaxaca letter, *supra* note 10.

[291] *Id* . The Boston FEB also stated:

> The Consumer Week Program conducted by the Boston FEB in FY 1974 devoted an entire day to the problems of the low income consumer. The Community Services Administration is a most active member of our Committee, its participation insures that our program addresses the needs of low income persons. The team visitation program of the Consumer Affairs Committee always includes meetings with minority and low income groups in each location. . . .In FY 1975 and again in FY 1976, the Consumer subcommittee of the Energy Conservation Committee conducted a series of meetings in each of the six New England States dealing with the special energy problems of the low income and the elderly, and published a directory of Federal energy assistance programs. We believe our consumer efforts for minorities and women are significant and substantial. *Id* .

[292] *Dallas-Fort Worth FEB FY '75 Annual Report*, *supra* note 167, at 40–44. OMB stated:

> Dallas indicates that the Commission made no mention that in FY 75, the Consumer Issues Committee did establish the Metroplex Consumers Council which was independent of the Committee. The Council met monthly in '75 and part of '76, but due to lack of funding assistance and diminishing interest, it disbanded [in] mid '76. The FY 75 objective to update and expand distribution of the Directory and to also publish a Spanish translation was not accomplished because the anticipated funding by the Consumer Affairs Department of the city of Dallas did not materialize. Oaxaca letter, *supra* note 10.

FINDINGS AND CONCLUSIONS

GENERAL

1. As previous volumes in this *Enforcement Effort* series have documented, the Federal civil rights enforcement program is beset with problems that are often directly attributable to and exacerbated by the absence of leadership from policymaking officials. We found inconsistent and duplicative compliance activities, complaint backlogs, infrequent preaward reviews, confusing or incomplete guidelines and regulations, and uncalled for delays in enforcement. Those legally charged with practicing equal opportunity were often provided with too little information as to what the laws demanded of them. Those whom our laws seek to protect were not fully informed of their rights. Federal agency civil rights offices were too frequently left to determine their own priorities. Given the absence of vigorous leadership from their agencies or from the Executive Office, civil rights offices did not establish programs directed toward the achievement of meaningful results.

2. Our experience in evaluating the civil rights activities of the executive branch leads us to believe that the Executive Office needs a capability to monitor, direct, coordinate, and improve Federal civil rights programs. Yet, such a capability was not developed.

3. During the past few years, there were some staff in the White House office and the closely affiliated Domestic Council who had special responsibilities relating to the concerns of minorities and women. Their duties included liaison with civil rights groups and policy review in response to specific issues. Further, the Office of Management and Budget (OMB) developed the rudiments of a system to evaluate Federal agency civil rights performance. For the most part, however, any monitoring which evolved from Executive Office civil rights assignments was ad hoc and intuitive. The combined efforts of the White House and OMB did not come close to providing comprehensive oversight of the Federal civil rights enforcement effort.

FINDINGS AND CONCLUSIONS

THE WHITE HOUSE 1971–1976

1. The White House, including the closely affiliated Domestic Council, did not successfully exercise leadership in behalf of civil rights programs.

2. There was no single office in the White House or Domestic Council responsible for a broad spectrum of civil rights concerns and no White House official whose exclusive concern was with civil rights enforcement. There were, for example, separate White House civil rights staff for matters of interest to blacks, Hispanic Americans, and women, but their duties did not generally include the regular monitoring of civil rights enforcement.

a. Until early 1975, staff with civil rights duties were located in at least five organizational units of the White House and there was very little coordination among them. This structure was divisive, creating competition among constituent groups. Attention was often focused on status within the White House rather than on issues of common concern, such as employment discrimination or lack of fair housing. Oversight of civil rights enforcement was inconsistent. Activities such as data collection, which could have been meaningful if there had been a joint effort, were undertaken only on behalf of individual groups. Without a central source to which all civil rights issues were directed, and which was knowledgeable about all significant details of the civil rights activities and assignments throughout the White House, it was difficult for the White House to ensure that its program was carried out with foresight. A Domestic Council committee on civil rights enforcement, established in 1971, was assigned no specific duties, never operated effectively, and eventually ceased to function.

b. From early 1975, staff with specific concerns for blacks, Hispanic Americans, and women were located in the Office of Public Liaison (OPL) which was the President's mechanism for communication with constituent groups, including minorities and women. In addition, the Office of the Counsel, which carried out the legal work of the White House, frequently worked on civil rights issues. This arrangement remedied some of the earlier problems of fragmentation, but OPL staff were not policymaking officials and their advice was seldom sought by White House decisionmakers.

c. As of April 1976, at least three Associate Directors of the Domestic Council had responsibilities relating to minority and women's affairs. However, they did not have full-time civil rights duties, and, despite the Council's broad range of activities, it had not systematically sought to remedy weaknesses in civil rights legislation or patterns of nonenforcement of civil rights laws.

3. The deficiencies of the Federal civil rights enforcement effort necessitate a systematic review of information regarding the entire spectrum of civil rights activities by the various Federal agencies concerned with nondiscrimination in such areas as employment, housing, education, and federally assisted programs. The budgets for these activities increased from 1971 to 1976.

a. Nonetheless, the White House did not systematically solicit reports from Federal agencies which would include statistics and facts on the status of equal opportunity for minorities and women.

b. It did not regularly gather information on the adequacy of Federal agency civil rights enforcement programs. Instead, White House information gathering was intuitive and ad hoc.

4. White House staff were generally reactive rather than active agents, with civil rights assignments undertaken largely in response to complaints, requests, and critical situations.

a. For example, White House interest in affirmative action in higher education was stimulated by academic institutions, which questioned whether the requirements of Executive Order 11246 should be applied to them.

b. In a number of areas where Federal agency civil rights programs were weak, the White House did not encourage improvement. For example, the White House did not encourage the Department of Housing and Urban Development to improve its inadequate regulations pertaining to sex discrimination or to the community development block grant program.

FINDINGS AND CONCLUSIONS

THE OFFICE OF MANAGEMENT AND BUDGET (OMB) 1972–1976

1. The Office of Management and Budget is responsible for oversight and review of the entire operation of the executive branch.

a. OMB's responsibilities provide it with a significant opportunity to improve the performance of the executive branch in carrying out the constitutional mandate to uphold the Nation's civil rights laws.

b. OMB directors repeatedly promised to build into OMB's institutionalized processes an ongoing concern for civil rights, and some progress resulted.

1) One of the responsibilities assigned to OMB's Deputy Director was the overall coordination and monitoring of OMB's civil rights effort.

2) OMB revised the *Examiners Handbook* , instructions for legislative review, and instructions for budget submissions to reflect a concern for civil rights.

3) OMB directors instructed all OMB staff to carry out civil rights responsibilities in the course of their regular assignments.

2. Nonetheless, the promise of an institutionalized civil rights concern was never fully realized. OMB did not devote sufficient resources to ensure that its staff understood and properly carried out the civil rights aspects of their assignments.

a. The position of Associate Director for Human and Community Affairs, which was delegated leadership responsibilities in OMB's civil rights program, remained vacant for almost 1-1/2 years, from October 1974 until May 1976.

b. The former Civil Rights Unit, which was delegated the specific responsibility for carrying out the Associate Director's leadership role, was staffed by two budget examiners.

c. The influence and functions of the Civil Rights Unit were gradually eroded. The unit was abolished, and, although OMB denied it, this Commission observed that the functions of that unit were not adequately assumed elsewhere in OMB.

3. The OMB budget process, which is one of OMB's most effective tools for identifying and rectifying deficiencies in Federal agency performance, was not adequately utilized for the review of Federal civil rights enforcement.

a. The Spring Planning Review, which is designed to focus on major long range goals and policy issues, was not used as a forum for discussing civil rights policy or programs issues.

b. Approaches to civil rights issues and familiarity with agencies' civil rights programs varied significantly among budget examiners, and few examiners made adequate use of the civil rights unit or of available civil rights information.

c. In the OMB Director's Review, OMB staff present an evaluation of agency performance, and the OMB Director determines the recommendations to be made to the President for the agency's budget and staffing. No civil rights issues were discussed in the Director's reviews in 1974 or 1975, although in years before such issues were considered.

4. An important OMB function is to develop management review systems for ensuring that Federal agencies are meeting their objectives. Yet OMB has not adequately used such systems to measure or further the achievement of civil rights goals.

a From 1973 through 1975 OMB did not ensure that civil rights goals were well represented among the objectives Federal agencies deemed to be Presidential priorities.

b. An OMB circular, which requires all agencies to establish a plan evaluating major problems, failed to require agencies specifically to evaluate civil rights programs or to include nondiscrimination as a criteria for evaluation.

5. OMB's evaluation function was severely handicapped by the lack of data on the race, ethnic origin, or sex of beneficiaries of federally assisted programs. OMB conducted studies which concluded that Federal agencies should collect such data, but OMB did not implement the recommendations of those studies.

6. In OMB's *Social Indicators 1974*, a statistical analysis of this country's social progress, OMB did not cross-tabulate data by race and sex and did not include any information on nonblack minorities. As of the summer of 1976, the plan for *Social Indicators*

1976 revealed that most of the same deficiencies will be present in that volume.

7. OMB must clear all draft legislation transmitted by Federal departments and agencies to Congress and collect agency views on legislation awaiting Presidential signature or veto.

   a. OMB Circular A-19 directs agencies to take into account laws pertaining to civil rights when considering proposed legislation.

   b. Nevertheless, OMB did not monitor agency comments to ensure that they comply with this provision.

8. OMB Circular No. A-95 provides for State and local government review of the potential effects of Federal assistance. One of its purposes is to help the Federal Government meet its obligation under Title VI of the 1964 Civil Rights Act to ensure nondiscrimination on the basis of race, color, or national origin in federally assisted programs. However, as of late 1976, Circular A-95 contained several deficiencies.

   a. It did not require an assessment of the impact of a proposed program on minorities.

   b. Women were not mentioned in the circular as a population group to be taken into consideration.

   c. Circular A-95 did not make clear that the agencies eligible to review proposed projects included public agencies charged with the protection of the rights of women.

   d. Federal agencies were not required to ensure that civil rights criticisms received through the A-95 process reached agency civil rights officials, and many State and local civil rights groups believed that their comments had been ignored.

   e. OMB did not monitor Federal agencies' implementation of Circular A-95.

9. Although OMB directors prescribed formal civil rights information sessions for all OMB staff, no sessions were held in 1975 or 1976. At information sessions held from 1971 through 1974, OMB management divisions were less represented than OMB budget divisions.

FINDINGS AND CONCLUSIONS

FEDERAL REGIONAL COUNCILS (FRCS) 1972-1976

1. The Federal Regional Councils, comprised of 11 grantmaking Federal agencies in each of the 10 standard Federal regions, are responsible for improving the delivery of Federal program benefits through coordination among the member agencies and with State and local governments.

   a. The Councils are part of a network of Federal leadership which, if properly used, could greatly assist civil rights enforcement activities.

   b. The FRCs constitute a potentially effective mechanism to transmit civil rights policy to State and local governments, through officials of the Federal Regional Councils, as well as to bring problems of the regions to the attention of national policymakers.

   c. Generally, FRCs have not taken full advantage of their opportunities in the civil rights area.

2. Executive Order 11731, which provides the basic authority for the FRCs, does not assign them any specific civil rights activities. It does, however, direct them to perform two major functions which relate to the Nation's civil rights laws.

   a. The FRCs are instructed to coordinate the activities of member agencies, each of which has responsibilities under various civil rights laws and Executive orders, including Title VI of the Civil Rights Act of 1964, provisions of Title VII of that Act, Title VIII of the Civil Rights Act of 1968, and Executive Order 11246.

   b. The FRCs are directed to develop better methods for providing Federal assistance to the American public, which should include removal of discriminatory impediments to minority and female participation in Federal and federally assisted programs.

3. Direction for Federal Regional Council activities comes primarily from the Under Secretaries Group for Regional Operations (USG), which establishes general policy for the Councils, and secondarily from the Office of Management and Budget (OMB), which assists USG by providing administrative support, coordination, and leadership.

   a. Neither USG nor OMB provided adequate civil rights direction for FRC activities.

   b. Although the 1976 USG guidelines encouraged the creation of FRC programs to assist Native Americans and migrants, a substantial proportion of whom are of Spanish origin, neither USG nor OMB formally assigned to FRCs any explicit programs for ensuring the rights of other minorities and women.

4. FRCs can develop their own programs, and occasionally some Councils initiated civil rights programs without formal persuasion from the Under Secretaries Group. However, in the FRCs reviewed such programs were generally of low priority and were not adopted by Councils in all regions.

   a. There were some programs developed in response to racial tensions, but they generally accomplished little.

   b. Some Councils maintained programs for persons of Spanish origin in the early 1970s, but by fiscal year 1976, these programs were largely discontinued. Councils failed to coordinate the development of bilingual assistance to aid Spanish speaking people to take advantage of Federal and federally funded programs.

   c. Most FRCs reviewed maintained migrant programs in recent years, resulting in a few accomplishments such as the publication of a medical service directory for migrants, but the Councils failed to address adequately other major issues, such as migrant employment, education, and housing.

5. Although the FRCs demonstrated an ability to coordinate successfully some Federal programs, such as energy development projects, and to respond positively to specific problems, such as those flowing from natural disasters, the FRCs reviewed undertook no steps to coordinate enforcement of Title VI of the Civil Rights Act of 1964.

   a. These FRCs did not identify overlapping compliance responsibilities of member agencies, assist member agencies to plan joint compliance reviews, or even aid them to cooperate in the timing of their reviews.

   b. They did not serve as a forum for the regular exchange of information among member agencies, through such tools as data and maps depicting concentrations of minorities within metropolitan areas, central files on previous compliance reviews, periodic newsletters on member agency compliance activities, or joint training and meetings where Council members could discuss compliance techniques.

6. The FRCs are also responsible for coordinating the implementation of OMB Circular No. A-95, which allows State and local officials, including civil rights officials, to review and offer their opinions on proposed Federal projects before they are funded.

   a. The Federal Regional Councils reviewed did not ensure that the circular's provisions which permit comments on the impact of proposed projects on minorities and women were fully utilized.

   b. They did not pay attention to whether State and local civil rights agencies were provided regular opportunities for reviewing proposed projects, as directed by the circular.

7. Although all FRC member agencies have responsibilities for ensuring equal employment opportunity, the Councils reviewed did not effectively coordinate the enforcement of equal employment opportunity laws.

   a. Federal Regional Council programs concerning internal employment of member agencies and the employment practices of Federal and federally assisted contractors tended to be weak and generally were phased out or deemphasized over the last few years.

   b. Some FRCs attempted to assist State and local governments to promote the employment of minorities and women by developing guidelines for affirmative action, but where guidelines were developed they were inadequate, failing to follow the affirmative action standards set forth by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs of the Department of Labor.

FINDINGS AND CONCLUSIONS

FEDERAL EXECUTIVE BOARDS (FEBS) 1972–1976

1. Federal Executive Boards, associations of senior Federal officials in 26 cities across the country, have two principal functions: to improve internal Federal management and to render services to the communities in which they are located. To carry out their activities, FEBs are dependent upon the voluntary cooperation of their members, guidance from lead agencies who design FEB programs, and encouragement from the Office of Management and Budget.

2. Given their basic functions, the Federal Executive Boards could be used as part of a network of Federal leadership to promote the protection of minority and female rights and to transmit information to the public as to how those rights can best be protected.

   a. Neither the Office of Management and Budget (OMB) nor FEB officials adequately recognized the civil rights potential of the FEBs.

   b. Policy guidance to the FEBs pertaining to minority and female rights primarily addressed Federal equal employment opportunity and minority business enterprise. FEB activities with regard to minority and female rights were generally limited to these two areas.

   c. Although the functions of the FEBs make it appropriate for them to provide leadership and assistance in response to the denial of minority or female rights within their own metropolitan areas, this Commission found no case where significant and effective leadership was provided.

3. All FEBs reviewed by this Commission had committees to promote equal employment opportunity for minorities and women, but their activities were largely ineffective.

   a. Only a few FEBs had equal employment opportunity objectives which were significant and would be likely to help eliminate discrimination; this deficiency was reflected in FEB equal employment opportunity activities such as conferences, a film festival, and a fashion show, which tended to be social rather than results-oriented.

   b. Even where FEB activities might have had some significance for reducing employment discrimination such as collecting and analyzing Federal employment data, promoting part-time employment of women, or establishing scholarships for disadvantaged students, the plans for these activities were frequently not implemented.

   c. FEBs' own studies of their equal employment opportunity activities did not evaluate their impact on reducing underutilization of minorities and women or eliminating the causes of discrimination.

4. There were Minority Business Opportunity Committees (MBOCs) in all 26 FEBs for the purpose of implementing the national program fostering minority business ownership and development pursuant to Executive Order No. 11625, and the relative success of these committees illustrates the potential power of FEB committees.

   a. The Office of Minority Business Enterprise (OMBE) of the Department of Commerce, which serves as the lead agency for MBOCs, encouraged MBOCs to establish separate subcommittees for carrying out minority business enterprise goals on procurement, construction contracting, concessions, capital development, data and publications, education and training, public relations, and program evaluation.

   b. OMBE issued clear guidance to MBOCs for minority business opportunity programs, including numerical goals for increasing procurement with minority businesses and deposits in minority banks.

   c. OMBE guidelines failed to address the need for assistance to female entrepreneurs.

   d. MBOCs, as other FEB committees, suffered to varying degrees from the voluntary nature of FEB structure. OMBE, in a pilot attempt to solve this problem, provided 11 of the 26 MBOCs with staff support. This support appeared to be a significant factor in these MBOCs achieving their goals.

5. Although FEB activity was often directed toward community services, FEB activities were not sufficiently responsive to the minority and female components of the communities they assisted.

   a. FEBs undertook fund-raising activities for charitable purposes through the Combined Federal Campaign, but the FEBs reviewed by this Commission did not have a formal mechanism to ensure that funds collected through the Campaign were distributed in a nondiscriminatory manner.

b. All FEBs have Information and Referral Committees designed to direct older persons to appropriate sources of assistance. With one exception—an FEB which provided bilingual assistance for elderly Spanish speaking persons and made provisions for the special needs of elderly women in its work plan–the FEBs studied by this Commission largely failed to take into account special needs of minority and female elderly.

c. Many FEBs had Consumer Affairs committees, but the activities of these committees were generally directed toward assisting the middle-income homemaker with little specific attention to the needs of low-income minority and female consumers.

RECOMMENDATIONS

GENERAL

1. The President should assume responsibility for comprehensive oversight of the Federal civil rights enforcement effort in order to: a) provide guidance, direction, and instruction to Federal agencies that need assistance in improving their civil rights programs; b) take executive action to strengthen the Federal civil rights enforcement efforts, including organizational changes where necessary; and c) make recommendations to the Congress for legislative action.

2. The President should establish a capability within the Executive Office of the President to assist him in monitoring and strengthening Federal civil rights programs, and to advise him in the development of Federal civil rights policy.

3. The President should consider the following means for creating such a capability:

   a. The President should appoint to the White House staff a cabinet level advisor whose primary role would be to make recommendations to the President for strengthening Federal civil rights enforcement programs. The advisor should have the clear authority to speak for the President in instructing Federal agencies to take action to improve their civil rights programs. The advisor should draw upon the resources of the Office of Management and Budget for assistance in evaluating Federal agency civil rights programs.

   b. Concomitantly, the President should instruct the Director of the Office of Management and Budget to establish a Division of Civil Rights within the Director's office, which would collect, compile, and evaluate up-to-date information on the status of Federal civil rights enforcement programs. The Division should draw heavily upon the existing resources of the Office of Management and Budget, including its budget examiners and statistical policy staff, to implement a system of data collection and reviews.

   c. Further, the President should direct Federal agencies to submit to the Office of Management and Budget, in a format to be decided upon by OMB, accurate, complete, and up-to-date information on the status of their civil rights programs. Agencies should be instructed to analyze the adequacy of agency programs as they compile this information and to inform OMB of any corrective action they plan to take.

More detailed recommendations for the establishment of an oversight capability are provided in the specific recommendations which follow.

RECOMMENDATIONS

THE WHITE HOUSE

1. As we specified in the *General Recommendations*, we urge the President to appoint to the White House staff a Cabinet-level advisor whose primary role would be to make recommendations to the President for strengthening Federal civil rights enforcement programs.

2. This advisor should have the full-time assistance of staff who serve either in the White House Office or as staff to the Domestic Council, and who have demonstrated expertise in the full range of civil rights concerns, including employment, housing, credit, education, health, and business enterprise.

3. The staff should be responsible for a) assessing progress made by minorities, women, and the handicapped toward the enjoyment of the rights afforded to them by the Constitution and Federal civil rights laws, and b) evaluating the status of Federal civil rights enforcement programs. They should make recommendations for strengthening Federal agency compliance programs, changes in legislation, and policy issuances by the President.

4. The staff should focus their efforts on all groups protected by Federal civil rights law, deviating from the past practice of having separate staff in the White House office for specific groups. We recognize and understand that the President may perceive the need to continue a public liaison function with minority groups, women, and the handicapped, but we would encourage that function to be distinct from the civil rights oversight role we are recommending.

5. The staff should base its recommendations on accurate, complete, and up-to-date information from Federal agencies which has been compiled and analyzed by the Office of Management and Budget.

   a. This information should include the civil rights duties assigned to Federal agencies by law, administrative order, and interagency delegation; the coverages and protections of Federal civil rights laws, orders, regulations, and guidelines; the means available, including sanctions, to each Federal agency in the event of noncompliance with the various requirements it enforces; the allocation of resources for Federal civil rights enforcement; the output of Federal agency civil rights programs, including such indices as the number of compliance reviews and complaint investigation conducted, the time elapsing between investigations and sanctions where noncompliance cannot be achieved voluntarily, and the number of enforcement actions taken; and litigation which affects the interpretation of Federal civil rights statutes or indicates the quality of Federal agency civil rights programs.

   b. The information should additionally indicate the extent to which minorities, women, and the handicapped participate as beneficiaries of Federal and federally-assisted programs and activities.

RECOMMENDATIONS

OFFICE OF MANAGEMENT AND BUDGET (OMB)

1. OMB should establish a Division of Civil Rights, locating it in the Office of the Director.

   a. The division should be given sufficient staff, budget, and authority to provide systematic leadership to and monitoring of the OMB civil rights effort. One of the primary qualifications for assignment to this staff should be an expertise in the civil rights area. The division should also provide information to the White House for White House oversight of the Federal civil rights enforcement effort and should take full advantage of the expertise on the White House Staff.

   b. The division should serve as a resource for all OMB staff; it should attend budget hearings of agencies with major civil rights responsibilities and provide input to management reviews of those agencies.

   c. All OMB divisions should be required to submit to the Civil Rights Division a quarterly statement of the civil rights activities they intend to accomplish and a summary of their progress since the last report.

2. OMB should ensure that Federal agency civil rights programs are carefully reviewed in all stages of the budget process.

   a. Examiners should be encouraged to bring unresolved civil rights issues to the attention of their division chiefs and ultimately to top OMB officials.

   b. Any serious unresolved civil rights problems should be discussed during the Director's review.

   c. If OMB is unable to obtain satisfactory resolution of a problem, the relevant issues should be presented to the President for consideration.

3. OMB's management evaluations of Federal agency performance should include assessments of the effectiveness of Federal agency civil rights efforts.

   a. OMB should require agencies to set goals for the performance of their civil rights compliance programs.

   b. OMB should require that performance against these goals be measured on a regular basis.

4. OMB should establish Government-wide requirements and standards for civil rights data collection.

   a. OMB should finalize standards for terminology and procedures to be used in racial, ethnic, and sex data collection.

   b. OMB should require Federal agencies to collect and analyze racial and ethnic data, cross-tabulated by sex, in all principal programs of Federal assistance for the purpose of determining if such assistance reaches beneficiaries of both sexes and of various racial and ethnic backgrounds on an equitable basis.

5. Plans for the next *Social Indicators* volume should be revised to include increased cross-tabulation by race or ethnic origin and sex, in addition to data on nonblack minorities.

   a. Where current Federal data are unavailable by sex or for nonblack minorities, OMB should direct the Federal agency concerned to revise its data collection procedures.

   b. Where data from earlier years exist on persons of Spanish origin but are not as comprehensive as data on blacks or whites, OMB should nonetheless include the data on persons of Spanish origin in *Social Indicators* so that some points of comparison will be available.

6. OMB's legislative clearance staff should seek assistance from the Civil Rights Unit in identifying civil rights issues in proposed legislation.

   a. Those legislative proposals which raise civil rights issues should be reviewed by the civil rights offices of the agencies concerned, this Commission, and the Civil Rights Division of the Department of Justice.

   b. Where comments by an agency or OMB division do not consider the impact of proposed legislation upon minorities, women, and the handicapped but such comments would be appropriate, the comments should be returned to the agency or the division for completion.

7. OMB Circular No. A-95 should be revised to require that all proposed projects be assessed in terms of and their impact on minorities, women, and the handicapped and to make clear that public agencies concerned with protecting the rights of women are permitted to evaluate proposed projects.

a. With the assistance of the FRCs, OMB should conduct an evaluation of the implementation of the civil rights components of the circular.

b. Where the results of the evaluation reveal that State and local civil rights agencies are not being notified of applications, OMB should direct the clearinghouses to make the required notification and request the FRC to conduct a followup investigation within 2 months to ensure that the agencies are regularly receiving notices of applications.

c. OMB should require that when projects which receive negative civil rights comments are funded, at a minimum the negative civil rights comments be forwarded to the civil rights office of the agency concerned for treatment as a civil rights complaint.

8. The Civil Rights Division should be held responsible for evaluating the civil rights training needs of OMB examiners and management staff, to ensure that they have the expertise to carry out the civil rights aspects of their assignments.

a. OMB should reinstate regular civil rights information sessions.

b. The division should establish a system for circulating civil rights information to OMB staff. For example, budget examiners should be provided with relevant reviews of their agencies' civil rights programs, such as those written by this Commission, the General Accounting Office, and the Department of Justice.

RECOMMENDATIONS

FEDERAL REGIONAL COUNCILS

1. The Under Secretaries Group (USG) should formally recognize that FRCs have an important role in assisting Federal civil rights enforcement activities, and OMB should assist USG in ensuring that this role is effectively carried out. In particular, USG should immediately direct the FRCs to:
   - a. Coordinate the civil rights enforcement activities of member agencies with regard to State and local governments.
   - b. Coordinate the grantmaking activities of member agencies to ensure that Federal assistance reaches minorities, women, and the handicapped on a nondiscriminatory basis.
2. Each Council should establish a standing civil rights committee to oversee all civil rights related activities of the FRCs.
3. In a spirit of cooperation among member agencies, the Councils should conduct a review to determine whether minorities, women, and the handicapped within their regions are receiving the benefits of Federal financial assistance on a nondiscriminatory basis.
   - a. Where assistance is not being distributed equitably, the FRCs should identify and seek to eliminate barriers to the fair distribution of benefits.
   - b. The Councils should identify geographic locations within the region in which bilingual service workers and materials are essential to ensure access to Federal and federally assisted programs.
   - c. The Councils should develop coordinated programs for member agencies in response to situations in their regions, such as school desegregation or credit discrimination or other issues which are of special concern to minorities, women, or the handicapped and which appropriately call for Federal action.
   - d. To the extent that Federal financial assistance is dispensed by nonmember agencies, those agencies should be invited to participate in the execution of the review and the development of recommendations.
4. In order to eliminate duplication and inconsistency in the civil rights enforcement activities of Federal agencies, the Councils should:
   - a. Identify overlapping civil rights compliance responsibilities of Federal agencies within the regions.
   - b. Establish procedures for interagency cooperation in a) collection of compliance information from State and local governments and other non-Federal institutions; b) the undertaking of joint reviews and investigations and coordination in the timing of compliance reviews and complaint investigations where joint activity is appropriate.
   - c. Establish mechanisms, such as maps and demographic profiles of metropolitan areas, for sharing information to be used in setting targets for compliance reviews.
   - d. Establish mechanisms, such as newsletters and central files, for sharing compliance information including investigations, findings, and status reports on recipient compliance.
   - e. Develop interagency training sessions for compliance officers and other equal opportunity specialists.
   - f. Identify interagency conflict caused by policies or procedures established at the national level and promptly submit a request to USG for resolution of any such conflict which is not amenable to resolution at the regional level. To ensure maximum coverage, the compliance responsibilities of nonmember agencies should be included in this process.
5. In conjunction with OMB, each FRC should ensure prompt implementation of the civil rights aspects of OMB Circular A-95.
   - a. Each FRC should determine the extent to which State and local government comments on proposed Federal projects include information on the impact of the projects on minorities, women, and the handicapped.
   - b. Each FRC should determine the extent to which State and local civil rights agencies, including commissions on the status of women, are provided the opportunity to review proposed projects.
   - c. Where Circular No. A-95 is not adequately used for civil rights comments, FRCs should transmit this information to OMB for appropriate action to improve the A-95 process.

6. In the absence of the creation of a National Employment Rights Board as this Commission recommended in *The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination*, the President should require each FRC to adopt the equal employment guidelines of the Equal Employment Opportunity Commission and the affirmative action requirements of Revised Order No. 4 of the Office of Federal Contract Compliance Programs, requiring State and local government recipients to meet the specifications set forth therein.

RECOMMENDATIONS

FEDERAL EXECUTIVE BOARDS

1. OMB, lead agencies, and FEBs should recognize the potential of the FEBs for obtaining public support of Federal policies to protect the rights of minorities, women, and the handicapped.

   a. Both OMB and lead agencies should formally encourage FEBs to exercise firm civil rights leadership throughout the metropolitan areas in which they are located. Such leadership should be demonstrated both by the manner in which FEB members administer their own agencies and by a program of information dissemination to promote concepts such as school desegregation and affirmative action, which although they are required by law often meet with resistance from some segments of the public.

   b. Both OMB and the lead agencies should keep FEBs fully informed as to Federal civil rights policies. The FEBs, in turn, should keep OMB informed through their annual reports as to local situations which can be improved through Federal civil rights leadership.

   c. FEBs should consider whether available resources permit FEB interagency cooperation in fair housing and equal educational opportunity.

2. The Minority Business Opportunity Committees should be continued, and OMBE should revise its guidelines to include female and handicapped entrepreneurs. OMBE should consider extending to all FEBs its pilot program of providing staff support.

3. OMB should seek, through CSC, the strengthening of FEB equal employment opportunity committees. The focus of these committees should be on strengthening internal employment practices of member agencies so that the member agencies can serve as models for all employers throughout the metropolitan area.

   a. One major goal of these committees should be to contribute to an increase in minority, female, and handicapped employment in all positions and grade levels in which these groups have been underutilized. The equal employment opportunity committees should regularly evaluate their own progress toward this goal.

   b. The FEB EEO committees should identify sources of data on the available work force by race, ethnic origin, sex, and handicapped status. They should consider assembling such data for affirmative action purposes. They should also consider undertaking such activities as encouraging minorities, women, and handicapped persons to apply for Federal positions and promoting training which will lead to an increase of minorities, women, and handicapped persons in management positions.

   c. The equal employment opportunity committees should maintain close contact with the internal equal employment opportunity staffs of member agencies to ensure that they complement rather than duplicate each others activities.

   d. In the absence of a National Employment Rights Board, the Civil Service Commission should remain the lead agency for equal employment opportunity, but the FEB system should actively seek input from the other Federal agencies with expertise in the area of equal employment opportunity, including the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs of the Department of Labor. Lead agency guidelines should be published in the *Federal Register* or, at a minimum, circulated for comment to the Washington offices of other Federal agencies.

4. OMB should request all FEBs to conduct a special review of each of their activities which are not specifically directed toward protecting the rights of minorities, women, and the handicapped. The purpose of the review should be to determine how responsive those activities have been to the special needs of minorities, women, and the handicapped.

   a. This review should include, but not be limited to, an assessment of programs on consumer affairs and for the elderly.

   b. The review should include an identification of the special needs of minorities, women, and the handicapped; a description of how those needs are currently being met; and a statement of plans to respond to needs which are currently not being filled. Reports on progress in meeting these goals should be required as part of the FEBs' annual reports.

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